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Vol. II

TRANSCRIPT OF RECORD

Pat. 166

Supreme Court of the United States

OCTOBER TERM, 1937

85,796
D.C. D.C.

No. 84

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 85

ALABAMA POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

No. 86

IOWA CITY LIGHT AND POWER COMPANY, PETITIONER,

vs.

HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

STATEMENT OF EVIDENCE

United States Court of Appeals for the District of Columbia

APRIL TERM, 1936.

No. 6579

TEXAS UTILITIES, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, APPELLANT.

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF; J. J. MADIGAN, ACTING EXECUTIVE OFFICER THEREOF; ET AL.

No. 6580

ALABAMA POWER COMPANY, A CORPORATION, APPELLANT,

vs.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; HORATIO B. HACKETT, ASSISTANT ADMINISTRATOR THEREOF, JOHN HERRICK, EXECUTIVE ASSISTANT THEREOF; ET AL.

No. 6583

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

FILED AUGUST 10, 1936.

PRINTED AUGUST 29, 1936

United States Court of Appeals for the District of Columbia

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United States Court of Appeals for the District of Columbia

Endorsed: United States Court of Appeals for the
1 District of Columbia. Filed Aug 18 1936. Moncure Burke, Clerk.

Equity No. 58927
TEXAS UTILITIES COMPANY
v.
HAROLD L. ICKES, ET ALS

Equity No. 59071
ALABAMA POWER COMPANY
v.
HAROLD L. ICKES, ET ALS

Equity No. 59671
ALABAMA POWER COMPANY
v.
HAROLD L. ICKES, ET AL

Equity No. 60245
IOWA CITY LIGHT & POWER COMPANY
v.
HAROLD L. ICKES, ET ALS

Statement of Evidence

Be it remembered that at the trial of these consolidated causes before Chief Justice Wheat on April 20, 21, 22, 23, 24, May 11, 12, 13, 14, 15, 18, 19, 20, 22, 26, 1936, proceedings were had, evidence was taken, exceptions noted on behalf of the plaintiffs, and rulings were made by the Court as follows:

2 The following appearances were entered:

On behalf of the plaintiffs, Texas Utility Company and Alabama Power Company:

Dean G. Acheson
Newton D. Baker
Raymond T. Jackson
Howard C. Westwood

On behalf of the Texas Utility Company:
Charles C. Crenshaw
On behalf of the Alabama Power Company
Perry W. Turner
On behalf of the Iowa City Light and Power Company:
Walter D. Guy
Louis H. Mann
C. D. Waterman
Wayne G. Cook
On behalf of all the defendants:
Alexander Holtzoff, Special Assistant to the Attorney General
John W. Scott, Special Assistant to the Attorney General
Jerome N. Frank, Legal Counsel, Federal Emergency Administration of Public Works
William J. Dempsey, Assistant Legal Counsel, Federal Emergency Administration of Public Works
Robert E. Sher, Assistant Legal Counsel, Federal Emergency Administration of Public Works
Thomas A. Cowan, Attorney, Department of Justice.

3 Plaintiffs introduced Stipulation Agreement No. 1. which was received in evidence. This Stipulation Agreement was signed by counsel for the defendants and by counsel for the plaintiffs.

This agreement provides that the facts set forth therein are true and that the documents attached thereto as exhibits are true copies of the originals. It further provides that the right of the defendants to object to the facts and documents included therein on the ground of their irrelevancy, immateriality or incompetency is in no way prejudiced.

PARAGRAPH I. (of the Stipulation Agreement)

Paragraph I of the Stipulation Agreement states that the plaintiff, Alabama Power Company, is a corporation organized and existing under the laws of the State of Alabama, that it is a resident and citizen of the State of Alabama with its principal office and corporate domicile in the City of Attalla, Alabama. There is incorporated in this Paragraph I, and attached, document marked "Exhibits A" and entitled "Charters and Amendments of Alabama Power

Company." Among the documents included in "Exhibit A" which show the history and development of Alabama Power Company, are the following:

1.—The original charter or certificate of incorporation of Alabama Power Company which was recorded December 4, 1906. Under this charter, Alabama Power Company was empowered to construct and operate an electric generating and distributing system in seventeen towns and cities within the State of Alabama. This charter authorized Five Thousand Dollars ($5,000) of capital stock.

2.—A certificate of change or alteration of the original charter of Alabama Power Company, recorded April
4 22, 1907, whereby an addition to the charter was made stating that the corporation was organized for the specific purpose, among others, of developing water power on the Coosa River in the State of Alabama.

3.—A certificate of change or alteration of the amended original charter of Alabama Power Company, recorded October 31, 1908, whereby an addition to the charter was made stating that the corporation was organized for the specific purpose of improving navigation on the Coosa River, and of developing in connection therewith, the full water power thereof.

4.—A certificate of change, alteration, and amendment of the original amended charter of Alabama Power Company, recorded April 23, 1913, by which the scope of operation of Alabama Power Company was enlarged to carry on the general electric utility business in 112 towns and cities within the State of Alabama.

5.—The certificate of incorporation of the Alabama Electric Company, recorded October 16, 1908, whereby the capital stock was authorized to be $8,500 and the company was empowered to do an electric utility business in 21 towns and cities within th State of Alabama. The charter of the Wetumpka Power Company, recorded March 21, 1907, whereby the capital stock was authorized to be $6,000 and the company was authorized to do an electric utility business in 17 towns and cities within the State of Alabama, and, whereby the company was specifically authorized to construct a water power dam across the Coosa River at Lock 15. A certificate of change or alteration of the original charter of the Wetumpka Power Company, recorded November 3, 1908,

5 whereby the company was stated to be organized for the specific purpose of improving the navigation upon the Coosa River in Alabama through the construction of water power dams and to distribute the power therefrom. Charter of Alabama Electric Company recorded November 14, 1908, whereby the company was authorized to have a capital stock of $5,000, to carry on an electric utility business in 17 towns and cities within the State of Alabama, and, specifically authorized to improve navigation on the Coosa River in Alabama and to develop and distribute in connection therewith the full water power of the river. Certificate of change or alteration of the original charter of Alabama Electric Company, dated July 14, 1910, which changed the name of the company to Alabama Power and Electric Company. Certificate of incorporation of Alabama Power Development Company, recorded March 29, 1907, whereby the company was authorized to have a capital stock of $300,000 and to carry on an electric utility business in three towns and cities within the State of Alabama.

6.—The joint agreement whereby the Alabama Electric Company, Wetumpka Power Company, Alabama Power and Electric Company, and Alabama Power Development Company merged into and with the Alabama Power Company, under the name of Alabama Power Cohpany. This agreement, recorded July 29, 1913, provided that the capital stock of the consolidated corporation should be $20,000,000.

7.—A certificate of incorporation of the Huntsville Railway Light & Power Company recorded July 29, 1899, whereby the company was authorized to conduct an electric street railway system in and around Huntsville, Alabama.

6 The authorized capital stock being $100,000. The certificate of incorporation of the Huntsville Electric Light Company recorded July 29, 1899, whereby the company was authorized to do an electric utility business in the City of Huntsville, Alabama, and its suburbs. The authorized capital stock being $50,000. The articles of agreement between the Huntsville Railway Light & Power Company and the Huntsville Electric Light Company whereby the two corporations were consolidated under the name of the Huntsville Railway Light & Power Company.

8.—The certificate of incorporation of the Decatur Light, Power & Fuel, Company, recorded April 16, 1903, whereby

the company was authorized to carry on an electric utility business in and around Decatur, Alabama. The authorized capital stock being $100,000.

9.—The certificate of incorporation of the Etowah Light & Power Company, recorded April 27, 1905, whereby the company was authorized to carry on an electric utility business in and around Etowah County, Alabama. The authorized capital stock being $24,000.

10.—The certificate of incorporation of the Pell City Light & Power Company, recorded May 28, 1914, whereby the company was authorized to carry on an electric utility business within St. Clair County, Alabama. The capital stock being $3,000.

11.—The joint agreement dated March 1, 1915, whereby Huntsville Railway Light & Power Company, the Decatur Light, Power & Fuel Company, Etowah Light & Power Company and Pell City Light & Power Company merged into and with Alabama Power Company under the name of Alabama Power Company. Under this agreement
7 the consolidated corporation was authorized to have a capital stock of $50,000,000.

12.—Certificate of incorporation of Little River Power Company, recorded November 5, 1906, whereby the company was authorized to develop a water power project on the Little River in Alabama and to carry on an electric utility business in three towns and cities within the State of Alabama. The authorized capital stock being $100,000.

13.—The joint agreement whereby the Little River Power Company was merged into and with the Alabama Power Company, which agreement was dated December 31, 1917.

13(a).—Certificate of alteration and amendment of the certificate of incorporation of Alabama Power Company whereby the 400,000 shares authorized common stock of the company of par value of $100 each was changed to 400,000 shares of common stock without nominal or par value, and, the par value of the 90,000 shares authorized but unissued preferred stock of the company of the par value $100 per share was changed to 90,000 shares of preferred stock without nominal or par value, and, further, the conversion at the option of the holders of any of the 10,000 shares of authorized and issued preferred stock of the par value of

$100 per share to the preferred stock without nominal or par value was authorized.

14.—The certificate of increase of the capital stock of Alabama Power Company effective April 3, 1924, whereby the capital stock of the corporation was increased by 300,000 shares of preferred stock without par value, so that the authorized capital stock of the corporation became 800,000 shares of which 400,000 shares were common stock without par value and 400,000 shares preferred stock, of which
8 preferred stock, 10,000 shares were of the par value of $100 per share and 390,000 were without par value.

15.—Act of the General Assembly of the State of Alabama incorporating the Cherokee Development and Manufacturing Company, approved December 8, 1900, whereby the company was authorized to conduct an electric utility business, the capital stock of the corporation being authorized to be $50,000. Minutes of the Directors Meeting of the Cherokee Development and Manufacturing Company held May 27, 1907, whereby the name of the corporation was changed to the Birmingham, Montgomery & Gulf Power Com-
9 pany. The certificate of incorporation of the Sheffield Company, dated December 7, 1904, whereby the corporation was authorized to carry on an electric utility business within the cities of Sheffield, Florence and Tuscumbia, Alabama, and their vicinities. The authorized capital stock being $1,000,000.

16.—Joint agreement whereby the Birmingham, Montgomery & Gulf Power Company and the Sheffield Company merged into and with the Alabama Power Company under the name of Alabama Power Company, which agreement was recorded July 21, 1925. Under this agreement the capital stock of Alabama Power Company was increased to one million shares, of which 600,000 shares were common stock without par value and the balance, 400,000 shares, was preferred stock as described above. Under this agreement, Alabama Power Company was authorized to carry on an electric utility business in some 255 towns and cities within the State of Alabama, in addition to those towns and cities in which it already was authorized to conduct an electric utility business.

17.—Certificate of creation and authorization of an additional 200,000 shares of preferred stock of Alabama Power

Company without par value, effective June 7, 1926. This certificate increased the authorized capital stock of the Alabama Power Company to 1,200,000 shares.

18.—Act of General Assembly of Alabama, incorporating the Mobile Gas Light and Coke Company, approved February 23, 1866, whereby the company was given the privilege for 30 years of engaging in a gas lighting and heating utility business in the City of Mobile, Alabama. Act of General Assembly of Alabama, approved December 5, 1894, whereby the life of the Mobile Gas Light and Coke Company was extended for an additional 30 years. Declaration of incorporation of the Electric Lighting Company of Mobile, Alabama, dated June 13, 1884, whereby the company was authorized to conduct an electric utility business in Mobile, Alabama, and was authorized to have a capital stock of $10,000. Act of General Assembly of Alabama, approved February 16, 1893, whereby the duration of the Electric Lighting Company of Mobile was extended for the term of 20 years. Agreement of consolidation between the Electric Lighting Company of Mobile and the Mobile Gas Light and Coke Company, dated May 16, 1903, whereby the companies were consolidated under the name of the Electric Lighting Company of Mobile and authorized to issue $300,000 capital stock and $300,000 in 5% gold bonds. The certificate of incorporation of the Mobile Electric Company, recorded May 30, 1906, whereby the corporation was authorized to carry on an electric utility business in and around Mobile, Alabama. The capital stock being authorized at $3,000,000. The consolidating agreement between the Electric Lighting Company of Mobile and the Mobile Electric Company, dated May 31, 1906, whereby the Electric Lighting Company of Mobile merged into the Mobile Electric Company. Certificate of amendment of consolidation agreement between the Electric Lighting Company of Mobile and the Mobile Electric Company, dated August 26, 1910, whereby the capital stock of the consolidated company was increased to $7,500,000. Certificate of incorporation of Consumers Power Company, dated August 11, 1924, whereby the corporation was authorized to carry on an electric utility business in some 33 towns and cities within the State of Alabama. The total authorized capital stock of the company being $2,000.00. Amendment to the

certificate of incorporation of Consumers Power Company changing name of the corporation to Gulf Electric Company, dated October 31, 1924. Certificate of amendment to charter and increase of capital stock of Gulf Electric Company, dated November 20, 1924, whereby the company was authorized to increase its capital stock to 125,000 shares without nominal or par value. Joint agreement whereby the Mobile Electric Company merged into and with the Gulf Electric Company, under the name of Gulf Electric Company. This agreement was dated October 16, 1925, and authorized the consolidated company to issue capital stock of 450,000 shares without par value, and, to carry on an electric utility business in some 131 towns and cities within the State of Alabama. Certificate of incorporation of the Houston Power Company, recorded May 29, 1920, whereby the corporation was authorized to carry on an electric utility business in some 44 towns an cities within the State of Alabama. The authorized capital stock of the corporation being fixed at $100,000. Certificate of increase of capital stock of the Houston Power Company, dated May 28, 1923, whereby the authorized capital stock was increased to 300,000 shares, 100,000 of which was to be preferred stock of $100 par value each and 200,000 shares to be common stock of $100 par value each.

19.—Joint agreement between Alabama Power Company, Gulf Electric Company and Houston Power Company, whereby these companies were consolidated under the name of Alabama Power Company, which agreement was dated October 3, 1927. Under this agreement a new corporation by the name of Alabama Power Company was formed, the existence of which was perpetual. The capital stock of the new consolidated corporation was authorized at 3,206,753 shares without nominal or par value. The new consolidated corporation possessed all the rights, privileges, powers, immnuities, contracts, easements and franchises of Alabama Power Company, Gulf Electric Company and Houston Power Company.

20.—Certificate of increase of capital stock of Alabama Power Company effective April 18, 1928, whereby the authorized capital stock of the corporation was increased by 400,000 shares of $5.00 preferred stock without nominal or par value.

21.—Certificate of increase of capital stock of Alabama Power Company effective May 24, 1929, whereby the authorized capital stock of the corporation was increased by one million shares of common stock without nominal or par value.

22.—Certificate of increase of capital stock of Alabama Power Company effective May 3, 1930, whereby the authorized capital stock of the company was increased by 643,247 shares of common stock without nominal or par value, so that the authorized capital stock of the corporation was increased to 5,250,000 shares without nominal or par value.

23.—Certificate of decrease of capital stock of Alabama Power Company effective April 18, 1934, whereby the capital stock of the corporation was decreased by retiring 16,116 shares of preferred stock owned by the company so that the total authorized capital stock of the company now consists of 5,233,884 shares without nominal or par value.

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No provision or restriction in the charter of Alabama Power Company in any way prohibits the company from obtaining a franchise of perpetual duration from any municipality.

PARAGRAPH II (of the Stipulation Agreement)

Paragraph II of the Stipulation agreement describes the defendants as follows:

Harold L. Ickes, the duly appointed, qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called P.W.A.), appointed by Executive Order of the President of the United States of America dated July 8, 1933, in pursuance of the provisions of Section 201(a) of Title II of the Act of Congress of June 16, 1933, entitled "National Industrial Recovery Act"; Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of P.W.A.; John Herrick, the duly appointed, qualified and acting Executive Assistant of P.W.A.; John J. Madigan, the duly appointed and qualified Acting Executive Officer of P.W.A.; F. E. Schnepfe, the duly appointed, qualified and acting Director of Projects Division of P.W.A.

Henry Morgenthau, Jr., the duly appointed, qualified and acting Secretary of the Treasury of the United States

and, as such, has general supervision and control over the disbursement of the public funds of the United States.

W. A. Julian, the duly appointed, qualified, and acting Treasurer of the United States and, as such, is, under the supervision of the Secretary of the Treasury, in control of the payment by means of the public funds of the United States, of checks drawn upon him.

Guy Allen, the duly appointed, qualified and act-
14 ing Chief Disbursing Officer of the Treasury Department and, as such, is at the head of the Division of Disbursements of the Treasury Department and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursement of the public funds of the United States.

PARAGRAPH III (of the Stipulation Agreement)

Paragraph III of the Stipulation Agreement states that Alabama Power Company is a taxpayer of the State of Alabama and of each of the cities of Decatur, Florence, Sheffield and of Tuscumbia, and of the cities of Guntersville, Hartselle, and Russellville, Alabama, and of the counties in which such cities are located, and with respect to its hereinafter mentioned properties and operations has paid to each of these cities, counties and to the State of Alabama, substantial amounts of taxes in the past and has paid or incurred the liability to pay such substantial taxes for the twelve months ended December 31, 1935.

PARAGRAPH IV (of the Stipulation Agreement)

Paragraph IV of the Stipulation Agreement states that Alabama Power Company is a taxpayer of the United States and with respect to its electric properties and operations in the State of Alabama including the properties and operations in each of the aforesaid cities, has paid to the United States many thousands of dollars in taxes in the past; and under the provisions of an Act of Congress, approved June 16, 1933 (48 Stat. 254, 256), for the period ended January 1, 1935, has paid, or incurred the liability to pay to the United States, excise taxes in the sum of $270,000, and has incurred the liability to pay the United States similar taxes for the current year.

15 PARAGRAPH V (of the Stipulation Agreement)

Paragraph V of the Stipulation Agreement states that Alabama Power Company now owns and operates electric public utility properties serving the public throughout the State of Alabama. These properties consist of hydroelectric and steam generating plants, of high tension transmission lines, of distribution lines, and of equipment and facilities, for use in generating, transmitting, distributing, metering and delivering electric energy. Among other communities served by the Alabama Power Company are the cities of Decatur, in the County of Morgan, Florence, in the County of Lauderdale, Sheffield and Tuscumbia in the County of Colbert, and the cities of Guntersville in the county of Marshall, Hartselle in the County of Morgan and Russellville in the County of Franklin.

PARAGRAPH VI (of the Stipulation Agreement)

Paragraph VI of the Stipulation Agreement states that Alabama Power Company's properties, including the properties serving the aforesaid cities and the individuals therein, are furnished with electric energy almost entirely by the following hydroelectric plants of the company:

1.—Lock 12, known as Lay Dam, on the Coosa River in Alabama, which was constructed by authority of an Act of Congress (34 Stat, 1288).

2.—Mitchell Dam, which was constructed on the Coosa River in Alabama under authority of a license issued by the Federal Power Commission which was authorized by the Federal Water Power Act (41 Stat. 1063). This license (Exhibit B-1) is attached to this Stipulation Agreement and incorporated by reference into this paragraph thereof.

16 The license recites that the Federal Power Commission found that this project of Alabama Power Company's was best adapted to a comprehensive scheme of development and utilization of the Coosa River for the purposes of navigation, of water power development and of other beneficial public uses; and, that the project was desirable and justified in the public interest for the purpose of improving and developing the Coosa River for the use and benefit of interstate and foreign commerce. The license further states that it was issued to Alabama Power Company

for the purpose of constructing, operating and maintaining for a period of fifty years from the date thereof (June 27, 1921) the project works therein described, necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power. The following conditions to the license were contained therein:

(a)—The cost of inspection by the United States during the period of construction of the project was to be borne by the licensee.

(b)—The operation and construction of navigation facilities constructed in connection with the project should at all times be controlled by rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam, as should be made from time to time by the Secretary of War.

(c)—The licensee should construct and install such appliances as necessary for furnishing power for the operation of navigation facilities, including lights and signals and should furnish free of cost to the United States power
17 for the operation of such navigation facilities.

(d)—Licensee would be required to provide a navigation channel between Mitchell Dam and Dam No. 12 at least 200 feet wide, in event a project for navigation on this section of the river was adopted.

(e)—Licensee should convey to the United States free of cost such of its lands and its rights of way and such right of passage through its dams or other structures and permit such control of pools as may be required to complete navigation on this section of the river in event of the adoption of the project for navigation of this section of the river.

(f)—The licensee was required to pay annual charges to the United States, based upon power generating capacity of the project, for reimbursing the United States for the cost of the administration of the Federal Water Power Act.

3.—Jordan Dam, likewise on the Coosa River in Alabama, was likewise constructed under a license from the Federal Power Commission. This license (Exhibit B-2) stated that the project was necessary and convenient for the development and improvement of navigation and for the development, transmission and utilization of power. It further stated that the Commission found that this project was best

adapted to a comprehensive scheme of improvement and utilization of this waterway for the purpose of navigation, of water power development and of other beneficial uses; and, further, that the project was desirable and justified in the public interest, for the purpose of improving and developing the Coosa River for the benefit of interstate and foreign commerce. The license was granted subject
18 to the following terms and conditions:

(a)—The license was issued for a period of 50 years from the date thereof (November 7, 1925).

(b)—For navigation purposes the licensee was required to install and maintain a standard gauge in the reservoir and another in the tailwater immediately below the power house, and, was also required to install and maintain a standard gauging station in the Alabama River (the stream into which the Coosa drains). The licensee was required to reimburse the United States for costs incurred in the annual supervision of these gauges.

(c)—The operation of navigation facilities constructed in connection with the project was at all times to be controlled by rules and regulations in the interest of navigation including the control of the level of the pool caused by such project, as made from time to time by the Secretary of War. These rules and regulations included the maintenance and operation by the licensee at its own expense of such lights and signals as directed by the Secretary of War and such fishways as prescribed by the Secretary of Commerce.

(d)—The licensee was to construct and install such appliances as were necessary for furnishing power for the operation of navigation facilities, and was to furnish free of cost to the United States the power for the operation of these navigation facilities.

(e)—The operations of the licensee so far as they affected the use, storage and discharge from storage of the water of the Coosa River, was at all times to be controlled
19 by rules and regulations of the Secretary of War prescribed in the interest of Navigation, and, in accord with such rules and regulations of the Federal Power Commission prescribed in the interest of flood control.

(f)—The licensee should convey to the United States free of cost such of its lands and rights of way and such right of passage through its dam or other structures and permit such

control of pools as may be required to complete such navigation facilities whenever the United States desired to construct navigation facilities at this project.

(g)—The licensee should make provision in this project for the future construction of a lock by the United States, and should excavate the upper approach channel to an elevation 270 feet above mean sea level before impounding the water behind this dam.

(h)—The licensee should pay to the United States annual charges for the purpose of reimbursing the United States for the costs of the administration of the Act, such annual charges to be based on the power capacity of the project.

4.—Martin Dam, on the Tallapoosa River in Alabama, which dam was also constructed under a license from the Federal Power Commission. This license (Exhibit B-3) stated that this dam was necessary and convenient for the development and improvement of navigation, and, was best adapted to a comprehensive scheme of improvement and utilization of this river for the purpose of navigation, for water power development and of other beneficial public uses. The license was issued to Alabama Power Company subject to the following conditions:

(a)—The license was issued for a period of 50 years from the date thereof (June 9, 1923).

(b)—For navigation purposes the licensee was required to install and maintain certain gauges for determining the stage and flow of the stream, and to reimburse the United States for the annual expenses incurred in the supervision of these gauges.

(c)—The licensee should pay to the United States annual charges for the purpose of reimbursing the United States for the cost of the administration of the Federal Power Act, these charges to be based on the power capacity of the project.

Paragraph VI of the Stipulation Agreement further states that in compliance with these conditions contained in the Federal Power Commission licenses, and in compliance with the Act of Congress (35 Stat. 1288) under which Lock 12 known as Lay Dam was constructed, the Alabama Power Company expended large sums of money in preparing certain portions of the Coosa River bed for future navigation. Alabama Power Company in compliance with these condi-

tions built piers in the streams to form navigation guides to the locks, and, in addition, constructed such dams so that locks could be erected therein as and when the United States might determine to complete the navigation from one pool level to the next. The completion of such projects on the Coosa River created contiguous slack water pools, 57 miles in length, and when such pools shall be connected by locks placed in the aforementioned dams, such pools will afford a 9-foot depth of navigation on such river for a distance of 49 miles.

21 PARAGRAPH VII (of the Stipulation Agreement)

Paragraph VII of the Stipulation Agreement states that the Alabama Power Company has held franchises in each of the Cities of Florence, Sheffield and Tuscumbia, Alabama. These franchises may be summarized as follows:

The Florence franchise granted to the Alabama Power Company's predecessor, and its successors and assigns, the right to construct and operate an electric light plant with the necessary poles and wires over the streets of Florence for the purpose of furnishing electricity to the citizens of Florence for the period of 30 years. By the terms of the franchise the City of Florence agreed to pay $1500. yearly to the plaintiff's predecessor and assigns, in consideration for which the predecessor and its assigns undertook to erect and maintain in good order an electricity plant furnishing efficient light service, to place poles under the City's directions, to repair sidewalks disturbed by the placing of poles, to furnish to the City at a price fixed a sufficient number of incandescent and arc lamps for the lighting of streets and public buildings to take up the sum of $1500. and to keep such lamps burning every night, to extend the arc light system as required by the City, to charge for electricity service to consumers no more than rates specified in the franchise beginning at the rate of 16c per kilowatt hour, and to run wires from lines to the consumers' buildings at the expense of the grantee of the franchise. The franchise was dated March 13, 1903.

The Sheffield franchise is in substantially the same terms as the Florence franchise, giving the right to operate the electric light plant for a period of 30 years. It was granted in October, 1902.

The Tuscumbia franchise is in substantially the same terms, giving the right to operate the electric light plant for 30 years. It was granted in October, 1902.

21a The foregoing three franchises were validly assigned to the Alabama Power Company in 1925. By their terms the franchises or rights so granted by the Cities of Sheffield and Tuscumbia expired in October, 1932, and the franchises or rights granted by the City of Florence expired in March, 1933. Since the expiration of the periods defined therein, the Alabama Power Company has continued to operate an electricity system in each of the said Cities and to sell to such Cities electricity for lighting the streets and public buildings and other public places therein except that the City of Sheffield has for some time been lighting its own streets.

The City of Hartselle, Alabama, on August 10, 1915, granted to the Alabama Power Company, its successors and assigns, the right, without stated duration, and in consideration of the benefits that would accrue to the City, to construct, maintain and operate an electricity plant and system for all purposes whatsoever over the streets and public places of the City, together with all appurtenances necessary to the transmission of electricity to the inhabitants and corporations both within and beyond the limits of the City. The poles and other appliances shall be constructed so as not to interfere unreasonably with the proper use of the streets and public places of the City and shall be maintained in good condition. Whenever any opening or alteration is made in any of the streets or public places of the City in installing or operating the poles and other appliances, the work shall be completed within a reasonable time and the streets and public places shall be restored to good condition. The City shall be held harmless from all liability or damage resulting from negligence in the construction or operation of the poles and other appliances. If the supply of electricity shall be interrupted by some cause beyond the control of the Alabama Power Company or its assigns the electricity service shall be restored within a reasonable time.

Meters for measuring current shall be installed, and
21b shall be maintained by the company or its assigns free of charge. The company or its assigns has the right to make a prescribed minimum monthly charge of

$1.00 per meter, whether or not electricity is used. The company or its assigns shall have the right to make a prescribed charge for electricity of 12c per kilowatt hour. The company is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills for electricity in excess of the monthly minimum charge shall be subject to a prescribed discount if paid within 10 days.

The City of Guntersville, Alabama, on July 5, 1915, granted to the Alabama Power Company, its successors and assigns in consideration of the benefits accruing to the said city, the right, without stated duration, to construct and operate an electricity plant and system for all purposes whatsoever over the streets and public places of the City together with all poles and appurtenances desirable to the transmission and furnishing through said City of electricity to the said City, its inhabitants and corporations both within and beyond its limits for all purposes for which electricity may be used. The poles and appurtenances shall be constructed so as not to interfere unreasonably with the streets and public places of the City and shall be maintained in good condition. Whenever the company shall make any opening or alteration in any of the streets or public places of the City in installing or operating poles or appliances the work shall be completed within a reasonable time and such streets and public places shall be restored to good condition under the supervision of city officials. The City shall be held harmless from all liability or damage resulting from negligence in the construction or operation of poles or other appliances. In the event the supply of electricity shall be interrupted by some cause beyond the control of the Alabama Power Company or its assigns the service shall be restored within a reasonable time. Meters for measuring current shall
21c be installed and shall be furnished and maintained free of charge. The Company or its assigns has the right to make a prescribed minimum monthly charge of $1.00 per meter, whether or not electricity is used. The company and its assigns shall have the right to make a charge of 12c per kilowatt hour. The company is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills for electricity in excess of the monthly mini-

mum shall be subject to prescribed discount if paid within 10 days.

The City of Russellville, Alabama, on June 28, 1923, granted to the Alabama Power Company, its successors and assigns, in consideration of the benefits accruing to the City, the right, without stated duration, to construct and operate in the City an electricity plant and system. The grantee is given the right to construct and operate in the City a system of poles and other appurtenances desirable to the transmission of electricity for all purposes whatsoever over the streets and public places of the City, together with the right to construct and operate such poles and other appurtenances desirable to the transmission through said City and the furnishing to said City and to the inhabitants and corporations both within and beyond the City's limits of electricity for all purposes and likewise for the purpose of extending lines and furnishing current beyond the City's limits. The poles and other appurtenances shall be constructed so as not to interfere unreasonably with the streets and public places of the City and shall be maintained in good condition. Whenever the Company shall make any opening or alteration in any of the streets or public places of the City in installing or operating the poles or other appliances the work shall be completed within a reasonable time and the streets or other public places shall be restored to good condition. The City shall be held harmless from all liability or damage resulting from negligence in the construction or operation of
21d poles and other appliances. The grantee may from time to time make and enforce reasonable regulations for the use of electricity. In the event the supply of electricity shall be interrupted by some cause beyond the grantee's control the service shall be restored within a reasonable time. The grantee shall install and maintain free of charge meters for measuring current and shall have the right to make a minimum monthly charge of $1.00 per meter whether or not electricity is used. All charges for electricity shall be no more than a prescribed schedule, beginning with a rate of 10c per kilowatt hour for the first 30 kilowatt hours and a progressively lower rate for increased consumption. The company is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills shall be subject to a prescribed

discount if paid within 10 days, subject to the prescribed monthly minimum. The prescribed maximum rates shall be subject to alteration and revision by the Alabama Public Service Commission.

The City of Decatur on October 16, 1919, granted to the Alabama Power Company, its successors and assigns, the right, for a term of 30 years, to construct and operate in the said City an electricity plant and system. The grantee is further given the right for 30 years to construct and operate in the City a system of poles and other appurtenances desirable to the transmission of electricity for all purposes whatsoever over the streets and other public places of the City, together with the right to construct and operate such poles and other appurtenances desirable to the transmission through said City and furnishing to said City and to the inhabitants and corporations both within and beyond the City's limits electric energy for all purposes whatsoever, and for the purposes of extending lines and furnishing electricity beyond the City's limits. The poles and other appurtenances shall be constructed so as not to interfere un-
21e reasonably with the proper use of the streets and public places of the City and shall be maintained in good condition. Whenever the company makes any opening or alteration in any of the streets or public places of the City in installing or operating the poles or appliances the work shall be completed within a reasonable time and the streets and public places shall be restored to good condition. The City shall be held harmless from liability and damage resulting from the construction and operation of the poles and other appliances, and the City, in the event of a claim against it for such damage, will not pay such claim before suit brought nor will it consent to judgment. The grantee may from time to time make and enforce reasonable regulations for the use of electricity. In the event the supply of electricity shall be interrupted by some cause beyond the grantee's control, the service shall be restored within a reasonable time. The grantee shall install and maintain meters for measuring current free of charge. The grantee shall have the right to make a monthly charge of $1.00 per meter whether or not electricity is used. The grantee shall have the right to make charges for electricity at a prescribed schedule beginning with 10c per kilowatt hour for the first

30 kilowatt hours and a progressively lower rate for increased consumption. The grantee is not required to furnish electricity to anyone until satisfied of his financial responsibility and may require reasonable security. All bills for electricity shall be subject to a prescribed discount if paid within 10 days provided that they shall not be below the prescribed monthly minimum. The rates shall at all times be subject to regulation and revision by the Alabama Public Service Commission. The grantee must connect its hydro-electric system with its distribution system in the City. The grantee shall maintain a local business office at a convenient place in the City whereat the public may transact such business as it may desire at reasonable hours during the day.

The Alabama Power Company is the only person,
22 firm or corporation engaged in supplying electric light and power to the cities of Hartselle, [illegible]ntersville, and Russellville, and, the cities of Decatur, Florence, Sheffield, and Tuscumbia and their inhabitants, and is the only person, firm and corporation now having facilities to distribute electric light and power to such cities and their inhabitants; except that the city of Sheffield has for sometime been lighting its own streets and selling power to some retail customers.

Rates for sale of electric power and energy by Alabama Power Company in the State of Alabama are subject to regulation of and are regulated by the State of Alabama through its Public Service Commission.

PARAGRAPH VIII (of the Stipulation Agreement).

Paragraph VIII of the Stipulation Agreement states that contracts between the Federal Emergency Administration of Public Works, for the United States of America, and the cities of Florence, Sheffield, and Tuscumbia, Alabama, were entered into on December 28, 1934. A contract between the Federal Emergency Administration of Public Works, for the United States, and the city of Decatur, Alabama, was entered into on December 6, 1934. These four contracts are attached to the Stipulation Agreement as Exhibits F-1; part 2-a (Florence), S-1; part 1-a (Sheffield), T-1; part 1-a (Tuscumbia), D-1; part 3-b (Decatur), and are incorpor-
23 ated in the Stipulation Agreement. These four con-

tracts were substantially the same in their terms, conditions, and provisions. Each provided among other things, for the following:

1.—Subject to the terms and conditions of the contract the United States Government agreed to aid the city in financing the construction of an electric distribution system, as described in the city's application, by loan and grant of federal funds not exceeding the following amounts:—

Florence	$436,000.
Sheffield	230,000
Tuscumbia	130,000
Decatur	350,000

30 per cent of the cost of labor and materials employed on these projects was to be a grant of federal funds by the Government to each city.

2.—The security taken by the Government for these loans was described as follows: "Special obligations of the Borrower, payable solely from and secured only by a first pledge of the revenues derived from the operation of the Project, after provision only for the reasonable cost of operation and maintenance thereof." These obligations were 4 per cent serial bonds of each city.

3.—The following condition precedent to the Government's obligation under each contract was stated: "Tennessee Valley Authority Contract. If the Borrower shall not execute a valid contract, satisfactory to the Administrator, between the Borrower and the Tennessee Valley Authority, under the terms of which the Tennessee Valley Authority
will supply electrical energy to the Borrower, and will
24 permit the borrower to charge such rates, in accord with the provisions of the Act and Ordinance authorizing the issuance of the Bonds, as may be reasonably necessary to pay the cost of operation and maintenance of the Project and the principal of and interest upon the Bonds. *Rate and Bond Ordinances.* If the ordinance providing for the fixing and maintenance of rates and collection of charges for the facilities and services afforded by the Project and the ordinance providing for the authorization, issuance and sale of the Bonds, and the use of the revenues derived from the operation of the Project, shall not be satisfactory in form and substance to the Administrator."

Paragraph VIII of the Stipulation Agreement also stated that each of the above four contracts was amended by an agreement between the Federal Emergency Administration of Public Works, for the United States, and each of the four cities. These amendatory agreements, which are attached to the stipulation agreement as Exhibits F-1; part 3 (Florence), S-1; part 3-a (Sheffield), T-2 (Tuscumbia), D-2 (Decatur), were entered into on the following dates:

Florence	April 15, 1935
Sheffield	" 6, 1935
Tuscumbia	March 26, 1935
Decatur	May 27, 1935

and, the only change or amendment to the original contracts effected by these amendatory agreements was the deletion from the original contracts of the clause stated above providing that the Government would be under no obligation under the contract if the cities did not execute the above described contract with the Tennessee Valley Authority.

Paragraph VIII of the Stipulation Agreement further states that each of the above four contracts, as amended, was terminated by a written agreement between the Federal Emergency Administration of of Public Works and each of the cities of Florence, Sheffield, Tuscumbia, and Decatur. Each of these four terminating agreements which are attached to the Stipulation Agreement as Exhibits F-2 (Florence), S-2 (Sheffield), T-1; part 4-a (Tuscumbia), D-1; part 6 (Decatur), was dated December 2, 1935, and, each agreement stated as the reason for the termination that it was to the mutual advantage of the city and the Government to terminate the loan and grant agreement. On December 4, 1935, new loan and grant agreements were entered into between the Federal Emergency Administration of Public Works, for the United States, and each of the cities of Florence, Sheffield, Tuscumbia, and Decatur, Alabama. The agreements were each attached to the Stipulation Agreement and are as set out in Exhibits A, B, C and D of the defendants' answer to the third amended bill of complaint in No. 59071 which may be treated as adopted and made a part of this Statement.

Paragraph VIII of the Stipulation Agreement states that contracts beween the Federal Emergency Administration of

Public Works, for the United States of America, and the cities of Hartselle, Russellville and Guntersville, Alabama, were entered into on December 4, 1935. These three contracts are attached to the Stipulation Agreement as Exhibits H-1; part 2-a, and part 2-b (Hartselle), R-1; part 1-a and part 1-b (Russellville), and G-1; part 2-a and part 2-b (Guntersville) and are incorporated in the Stipulation Agreement. They likewise appear as Exhibits A, B and C of the defendants' answer to the second amended bill of complaint in No. 59671 which may be treated as adopted and made a part of this Statement.

There is attached to Paragraph VIII of the Stipulation Agreement as Exhibit X a document compiled, published and distributed by the Federal Emergency Administration of Public Works, entitled "Contract Record Memo-
39 randum." This document contains suggested forms and instructions to be followed by applicants in approving and executing loan and grant agreements with the Federal Emergency Administration of Public Works for the United States.

Whereupon

James M. Barry

was called as a witness on behalf of the plaintiffs, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

I am vice-president and general manager of the Alabama Power Company. I was trained as an engineer, being graduated from the University of California, class of 1910, in electrical engineering. I have had experience on the Pacific Coast with the Pacific Gas and Electric Company and other utility companies. I came to Alabama at the close of
40 1918 as one of the division managers of Alabama Power Company and was stationed at Anniston, Alabama. Since that time I have worked in various capacities for the company and in 1926, I was made vice-president of the company. In 1927 I was made vice-president in charge of operations, and in 1932, I was made vice-president and general manager. Alabama Power Company is engaged in the distribution and sale to the public of electricity in the State of Alabama. Alabama Power Company operates a

generating, transmitting and distributing system in the State. The lines of the company pass through 66 of the 67 counties in the State of Alabama and we operate in 65 of the 67 counties of the State of Alabama. The Alabama Power Company furnishes light as well as power and does a general business of industrial, commercial and residential service in the State of Alabama. The electric power business of Alabama Power Company includes all these classifications of power. The Alabama Power Company has 6 large hydroelectric plants, 3 of them are located on the Coosa River and 3 on the Tallapoosa River. The plants have a total installed capacity of 414,500 kilowatts. The plants on the Coosa River are what we term "run-of-river" plants, that is, they do not have appreciable storage in the upper reaches of the river. The plants on the Tallapoosa River make use of storage, the storage being at the uppermost plant of the three, Martin Dam, and the water is utilized through Martin Dam and through the two plants lying immediately below it. The hydro system makes for an ideal integrated operation in that in the summer time, when the flows on the Coosa River are low, we can utilize the storage on the Tallapoosa and thus make up deficiencies on the Coosa. The three plants on the Coosa River are known as Lay Dam, Mitchell Dam and Jordan Dam. The plants on the Tallapoosa River are known as Martin Dam, Upper Tallassee, and Thurlow. Mitchell Dam, Jordan Dam, and
41 Martin Dam, are operated under license from the Federal Power Commission, and, Lay Dam, which was completed in 1914, was constructed under special Act of Congress. Lay Dam is sometimes referred to as Lock 12. With respect to Mitchell Dam, the license was issued designating the place as Duncan's Riffle. With respect to Jordan Dam, the license was issued designating that as Lock 18. With respect to Martin Dam, the license designated it as Cherokee Bluffs.

We are an Alabama company and our business is done wholly within the State but we have interconnections with companies in adjoining States. We send electricity into Georgia and a small quantity into Tennessee and we send some into Mississippi and some into the Panhandle of West Florida. None of our lines go beyond the State boundaries

and deliveries are nominally at the State lines and our properties extend only up to State lines. In some cases the meters are located some distance on the Alabama side of the State line. Our territorial maximum kilo-watt hour demand, that is, our demand in the State of Alabama for 1935, was 294,000 kilowatts. Defining transmission lines as those with voltages of 154,000 volts, 110,000 volts, 44,000 volts, and 22,000 volts, and I might say that the amount of 22,000 volts is relatively small in the total, we have 3,575 miles of transmission lines in the State of Alabama. Distribution lines are defined as those below 22,000 volts and the voltages are 11,000; 6,600; 4,000 and 2,300. We have a total of 3,931 miles of such distribution lines. A distribution line, as it is commonly known in the electric business, is one that serves the domestic and commercial consumer. Among utility operating men there is a distinction, usually of about 22,000 volts, between transmission lines and distribution lines. Below 22,000 volts is usually considered distribution voltage, and, considering distribution systems in cities and towns, we usually find that 11,000 volts is the top voltage,
42 and, probably the most common voltage is 4,000. I am, of course, referring to the primary voltages. Those are not the voltages at which the customers use the electricity for there is another transformation below that to the usable voltages of 440, 220, or 110, whatever the local condition happens to require. The Alabama Power Company serves directly 515 communities within the State of Alabama, of which 212 are incorporated. Among the incorporated cities which Alabama Power Company serves are the cities of Florence, Sheffield, Tuscumbia, Decatur, Hartselle, Guntersville and Russellville.

The Alabama Power Company serves directly, as of the end of 1935, 114,760 customers, and, indirectly serves through resale to other utility corporations or municipalities, an estimated number of 80,000, making a total of about 195,000 customers served directly and indirectly. The number of employees of the Alabama Power Company as of December 31, 1935, was 2,186.

"By Mr. Turner:

"Q. Mr. Barry, it is admitted in the stipulation that the company pays taxes to the State, the county, the city, and the Federal Government. I will ask you to state the amount

of such taxes for each such governmental subdivision—only the counties in which the towns involved here were situated? A. Let me understand your question, Mr. Turner. Are you asking about the total taxes of the company now, or are you asking about the taxes applicable to these seven towns and the counties in which they are situated?

"Q. Let me get at it in this way: How much tax does the company pay to the State of Alabama? A. The company accrued from operating expenses last year for taxes $2,427,-188, and we paid out something over $2,500,000.

"Mr. Frank. If the Court pease, we are not ob-
43 jecting to this evidence being taken, but, by remaining silent, we do not want to be precluded from objecting on the ground that it is irrelevant, after the evidence is admitted, on the ground that it does not show any standing to sue, and is irrelevant. We have no objection to its being taken, but we want to reserve our right to move to strike it out. May we do that?

"The Court. I think it may be understood that you object to this line of testimony, and I overrule your objection, and you have an exception, your objection being based upon the ground of relevancy, is that it?

"Mr. Frank. On the ground that it is irrelevant and immaterial.

"The Court. I think we had better take the testimony.

"Mr. Frank. I would suggest that it would be better to take it.

"The Court. Then, at the end of the case, I can better determine it.

"Mr. Frank. But we do not want to waive the objection."

We paid to the State of Alabama in taxes for 1934, $918,-391.51, and in 1935, $973,728.11. The State, county and school district taxes paid within the counties in which these seven cities are located, for 1934 were $37,920.80, and for 1935, $36,982.29. The amount of city taxes paid to each of the seven cities involved in this suit, are as follows: For the city of Decatur in 1934, $6,082.46; for 1935, $9,058.72, these figures including ad valorem taxes and city licenses. For the city of Florence in 1934, $5,319.20; for 1935, $5,218.70. For the city of Sheffield for 1934, $5,350.60; for 1935, $5,091.08. For the city of Tuscumbia, $1,912.95 for 1934 and 1935, $1,943.63. For the city of Guntersville, for 1934, $1,468.22;

for 1935, $1,254.68. For the city of Hartselle for 1934,
$579.49; for 1935, $605.56. For the city of Russell-
44 ville for 1934, $1,350.24; for 1935, $1,240.03. The company has paid the 3 percent electric tax to the Federal Government since the adoption of that Act, and, the total amount paid from October 1, 1933, to January 31, 1936, was $335,414.87.

The total gross earnings of the company for the year 1934 were $15,407,516.00, and for 1935, $16,794,483.00. Of this sum, the gross electric revenue was $14,995,030.00, and for 1935,$16,364,857.00. The seven cities involved in this suit are a part of the integrated system of Alabama Power Company and they enjoy their service off the same transmission network that the other cities which we serve receive their service from. The largest portion of our electricity comes from our hydro electric plants, I should say 80 percent of it last year and the four plants under license from the Federal Power Commission are the largest of the six hydro-electric plants.

The total installed generating capacity of Alabama Power Company is 624,292 kilowatts. That of course is a different thing from the prime capacity of the system operating as an integrated system. Operating independently of any other companies with which it is connected, the Alabama Power Company has a prime capacity in the driest year on record, with the largest steam plant that it has on its system out of service, of 393,000 kilowatts. We have several large modern steam plants to supplement the hydro-plants whether in emergencies or during low water periods. The total capacity of the steam plants which we own is 156,000 kilowatts, and of that 130,000 kilowatts is located in the coal fields right near the load center of the system. These are very efficient and modern plants. In addition to the owned steam plants, we have leased steam plants with an available capacity
amounting to 53,800 kilowatts. All these figures are
45 for the close of 1935, and "KW" is an abbreviation for kilowatts. The maximum territorial demand in Alabama is 294,000 KW. The Alabama Power Company acquired the properties in Florence, Sheffield and Tuscumbia during the early part of 1925 from the local operating company there which secured its power from a local steam plant. Our records indicate that we started operating there

on January 2, 1925. Shortly after we purchased the local property, we shut down the local steam plant and connected the local system to our transmission network, did a great deal of rehabilitation work, and reduced rates. At Russellville we acquired the local system from the municipality which was operating it. We started operation there on November 1, 1923. It was a very badly rundown system and secured its power from a small local steam plant. My record indicates that we connected it to our system immediately and practically constructed a new distribution system in the city. In Decatur we acquired the property in 1915 from a predecessor company. Decatur secured its power supply from a local steam plant and we operated that steam plant until 1920 when a transmission line was completed to Decatur, at which time the Decatur distribution system was connected to our transmission system. At Hartselle, the property was acquired by us in August 1915, from a private individual. It was a very small system and was operated as a local system, receiving its power supply from a small steam plant that was run in connection with a planing mill. We operated the local plant until 1916 when we connected the Hartselle distribution system to the Decatur distribution system and thereafter operated both as a unit. At Guntersville, we built a system new in November 1915 and the first power we had there was a small steam plant. We added to it in 1917 and connected it to our transmission system in 1924. The total number of customers of the company in December, 1935, for each of these seven
46 cities was: Decatur, 3,500; Florence, 2,475; Sheffield, 1,376; Tuscumbia, 952; Guntersville, 591; Hartselle, 608; Russellville, 622, a total of 10,124. The revenues for the twelve months ending December 1935 from all customers in each of these seven cities, including revenues from residential, commercial, street lighting; industrial power, etc., was: For Decatur, $284,911.31; for Florence, $190,789.19; for Sheffield, $100,623.69; for Tuscumbia, $47,728.29; for Guntersville, $64,777.35; for Hartselle, $281,056.46; for Russellville, $70,135.82; a total of $787,022.11.

The rates and service of Alabama Power Company are regulated by the Alabama Public Service Commission. In all seven towns we have progressively reduced the rates

ever since our entry into the local situation, so that the rates now are very much lower than when we took over the properties. Those rates were put into effect by order of the Alabama Public Service Commission. We have made a study of the comparison of rates existing in the seven cities at the time of the acquisition of these properties by Alabama Power Company and the rates now in effect. We have made a particular study of the residential rates in somewhat the same form that the Federal Power Commission has used in its national survey, and I have here a tabulation giving the monthly bill for 25 KW hours, 100 KW hours, and 250 KW hours, before acquisition by the Alabama Power Company and then progressively through the years down to 1936.

"(By Mr. Turner)

"Q. What is the percentage of change, increase, or decrease in rates?

"Mr. Scott. To which we object, your Honor. It is wholly incompetent, irrelevant and immaterial to determine the issues here. We are not here on any matter involving the rate structure. * * *

* * * * * * * * *

"The Court. I will sustain the objection. I do not think that it is material.

"Mr. Turner. We will reserve an exception if your Honor please.

"The Court. Yes.

"Mr. Turner. And we offer to show by this witness that rates have been materially reduced over the years.

* * * * * * * * *

"(By Mr. Turner):

"Q. Mr. Barry, what is the policy of the Commission with reference to the uniformity of rates in Alabama throughout the territory it serves?

"Mr. Scott. To which we object. It is absolutely incompetent, irrelevant and immaterial.

"The Court. I sustain the objection to that.

"Mr. Turner. We reserve an exception, if your Honor please, and offer to prove that the Alabama Public Service Commission has estabished a policy of making the rates of

this company uniform throughout the State for domestic, commercial and industrial service. We reserve an exception.

"The Court. Very well."

Alabama Power Company has agreed to sell a portion of its transmission system to the Tennessee Valley Authority and the cities of Florence, Sheffield, Tuscumbia, Russellville, Decatur and Hartselle are served by that portion of its transmission system. The only city that is not served by that portion of the company's transmission system is the town of Guntersville. That portion of Alabama Power Company's transmission system is located in northwestern Alabama. Albama Power Company had negotiations with the cities of Florence, Sheffield, Tuscumbia, Russellville, Decatur and Hartselle for the sale to those cities of its distribution systems located therein. The negotiations with Sheffield began in June 1933. The negotiations with Tuscumbia began shortly thereafter. The negotiations
48 in Florence took place about November 1933, and the negotiations in Decatur, Russellville and Hartselle took place in February 1934.

"Q. Did the company make an offer to those towns to sell the properties to them?

"Mr. Scott. To which we object. It is wholly incompetent, irrelevant and immaterial to the issues.

"The Court. How is that relevant? If it is, I want to know it.

"Mr. Turner. If your Honor please, at the time these offers were made, the towns had application pending before the PWA to secure these loans in three of the towns, Florence, Sheffield and Tuscumbia, the franchise of the company had expired. They were there under an indeterminate franchise. We sought to minimize our damages by an agreement to sell these properties to these towns. We made that offer to them and we want to show by this witness that they rejected our offer solely because they admitted that the price at which we had offered the property was reasonable, but in view of the 30 percent grant by the Government, they could not buy; they would not buy."

(Then followed a lengthy colloquy between counsel)

"Mr. Frank. • • • • I would like to have the testimony go in subject to objection and argue the points at the proper time.

"The Court. I can determine the legal effect later. Sometimes in equity cases considerable time is necessarily devoted to exclude some evidence at the start and then I find, after the case is pretty nearly completed, that there is a relevancy that I could not see at the time. I will admit it now."

Whereupon it was agreed in open court on the record that the correspondence between Alabama Power Company and the six towns with reference to the purchase of the properties would be admitted in evidence subject to the
49 defendants' right of objection and subject to their right to supplement letters if any are omitted in the correspondence.

Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the Cities of Sheffield and Tuscumbia with reference to the negotiations between the cities and the company for the sale of the company's distribution systems in Tuscumbia and Sheffield to the cities. This folder of correspondence was offered as Plaintiffs' Exhibit No. 1 and was received in evidence. Plaintiffs' Exhibit No. 1 contains the following letters:

50

Commission
City of Sheffield
Alabama

June 9, 1933.

Alabama Power Company,
Power Building,
Birmingham, Alabama.

Gentlemen:— Re: City of Sheffield

I have been requested, by resolution adopted by the Commissioner of Sheffield on June 6th, 1933, to request of you the following information:

The City Commission would be pleased to have your price, based on the present replacement value, of the electric light and power system now owned by your Company

in the corporate limits of the City of Sheffield, exclusive of the following:

Street Car barn and appurtenances.
Transmission line to Florence.
Power Building in Sheffield.
Interest in pumping station in Sheffield.

If additional information is needed as to the exact information we desire, I will gladly forward the same to you. Thanking you, I am

Yours truly,

W. H. RICHESON
President City Commission
Sheffield, Alabama.

51 June 10, 1933.

Mr. W. H. Richeson,
President City Commission,
Sheffield, Alabama.

Dear Mr. Richeson:

I have your letter of June 9 asking for a price on our electric distribution system in the City of Sheffield.

We should like to discuss this matter with your Commission, but at the present time we are very busy preparing for a rate hearing before the Public Service Commission on June 20. If satisfactory to you, I should like to visit Sheffield shortly after the completion of the hearing and go into this matter with you.

Will you kindly let me know if this arrangement is satisfactory.

Yours very truly,

J. M. BARRY
Vice Prés. & Gen. Mgr.

JMB:h
b/c-Mr. J. T. Jackson

52

Commission
City of Sheffield
Alabama

June, 12, 1933.

Mr. J. M. Barry, Vice-President & Gen. Manager,
Alabama Power Company,
Birmingham, Ala.

Dear Mr. Barry:

We have your letter of the 10th in which you state that you would like to visit Sheffield and discuss with our Commission the matter referred to in our letter of the 9th, but because of the rate hearing on the 20th you will be busy until that time.

We will be glad to see you as soon after the 20th as you may find it convenient. Will thank you to advise us a couple of days in advance of your coming that we may arrange a meeting to suit your convenience.

Yours very truly,

W. H. RICHESON
President—City Commission.

53

Commission
City of Sheffield
Alabama

August 31, 1933.

Alabama Power Company,
Birmingham, Alabama.

Gentlemen: Re: City of Sheffield-Alabama.

The City of Sheffield has ascertained that it will be impossible to borrow money from the Federal Emergency Administration of Public Works for the purpose of buying existing electric systems and that they will lend money only for the purpose of erecting new systems.

The City of Sheffield wishes to enter into negotiations with your company for the exchange of its proposed 4% twenty year revenue bonds for your system now in use in the City. These bonds will be of the same mature and secured by the same security as those the city proposes to pledge to the Federal Emergency Administration of Public Works for the payment of money borrowed for erection

of a new system in Sheffield. These bonds to be revenue bonds and secured by pledge of revenue and mortgage on system.

We would appreciate hearing from you in regard to the above matter. Thanking you, we are,

Yours truly,

Board of Commissioners,
Sheffield, Alabama
By W. H. RICHESON
President.

54

City of Tuscumbia
Tuscumbia, Alabama

Sept., 5, 1933.

Mr. Thomas Martin, Pres.,
Alabama Power Co.,
Birmingham, Alabama.

Dear Sir:

The City of Tuscumbia has made application to the Government for a loan with which to construct an Electrical Distributing System. The City proposes to pay the Government with 4%, 20 year electrical income bonds at par.

Please advise at the very earliest date whether you will accept such bonds in payment for your local electrical distributing system. The bonds would be secured by mortgage on the distributing system and would not be a general obligation of the City.

It has been rumored that the City cannot borrow money with which to purchase your local system.

If you are willing to accept such bonds, please arrange for immediate negotiations for the purchase of your system.

The City is obliged to begin construction on a new system within a month from the date of the grant of the Government loan. Negotiations for the purchase of your system must therefore be concluded by that time.

Your prompt advice will be appreciated.

Yours very truly,

W. L. FARR
Mayor.

55

Alabama Power Company
Birmingham, Alabama

Thomas W. Martin
President

September 6, 1933.

Hon. W. L. Farr, Mayor,
City of Tuscumbia,
Tuscumbia, Alabama.

Dear Mr. Farr:

We beg to acknowledge your letter of the 5th of September concerning the purchase by the City of Tuscumbia of our distribution system. We are giving consideration to the matter in accordance with your suggestion, and will be glad to discuss it with you in the very near future.

I am,

Yours very truly,

THOMAS W. MARTIN,
President.

56

City of Tuscumbia
Tuscumbia, Alabama

September 11, 1933.

Alabama Power Company,
Birmingham, Ala.,

Gentlemen:

We have had no definite reply to our letter of September 5th and we are asking if your are interested in selling us your electrical distributing system in the City of Tuscumbia, taking in payment therefor, 20 year 4% bonds secured by a mortgage on the property.

Unless we have advice from you not later than September 14th naming a price that is satisfactory to us, to be paid in 20 year 4% bonds secured by the property, said bonds to be issued under an indenture that will permit the borrowing of funds from the Government to improve and extend the system, we will understand that you are not interested in selling the system to us and will proceed accordingly.

Yours very truly,

W. L. FARR
Mayor.

57 Alabama Power Company
Birmingham, Alabama

Thomas W. Martin,
President

September 12, 1933.

Mr. W. L. Farr, Mayor,
City of Tuscumbia,
Tuscumbia, Alabama.

Dear Mr. Farr:

Referring to your letters of the 5th and 11th of September:

We beg to advise that we will sell to the City of Tuscumbia our electrical distribution system, taking in payment therefor revenue bonds secured by a mortgage on the property. A representative of our company is prepared to meet you at your convenience to agree upon the items and price of the property you wish to purchase, and the terms and conditions of the mortgage and bonds.

We await your further suggestions.

Yours very truly,

THOMAS W. MARTIN,
President.

58 Alabama Power Company
Birmingham, Alabama

Thomas W. Martin
President

September 12, 1933.

Mr. W. H. Richeson, President,
Board of Commissioners,
Sheffield, Alabama.

Dear Mr. Richeson:

Referring to your letter of the 31st of August:

We beg to advise that we will sell to the City of Sheffield our electrical distribution system, taking in payment therefor revenue bonds secured by a mortgage on the property. A representative of our company is prepared to meet you at your convenience to agree upon the items and price of

the property you wish to purchase, and the terms and conditions of the mortgage and bonds.

We await your further suggestions.

Yours very truly,
THOMAS W. MARTIN,
President.

TWM-c
Blind copies to:
Mr. Yates
Mr. Barry
Mr. Turner
Mr. Stanley.

59 September 28, 1933

Messrs. Lyde & Adler,
Woodward Building,
Birmingham, Alabama. *Attention Mr. Julian E. Adler*

Gentlemen:

We are handing you herewith an inventory of our electrical distribution systems serving the cities of Sheffield and Tuscumbia and environs.

At our meeting in Sheffield with yourselves and City Officials of Sheffield and Tuscumbia, on Monday the 18th instant, you advised it was your desire to purchase only a part of our system. The inventory we are submitting herewith was made under direction of J. E. Sirrine & Company of Greenville, S. C., and gives in detail all items of distribution system property. Those items noted with an asterisk are the items which we understand from our meeting at Sheffield, were not to be included in the purchase by the cities. The other items on the inventory are the ones which we understood at this meeting you desired to include in the purchase.

It was the writer's understanding at the Sheffield meeting that you gentlemen would price this inventory on behalf of the two cities; we would likewise price copy of the inventory, and when the pricing was completed our engineers would meet with you as engineers for the cities and discuss the pricing, endeavoring to agree upon the price of as many items of property to be conveyed to the cities as it were possible for us to agree upon. Such items as could not be agreed upon would remain for discussion with the respective City Officials.

In your letter of September 23rd to our Mr. E. W. Robinson you have indicated a desire on the part of the cities to also include in the inventory the office buildings, warehouses, etc. We are bringing our inventories up to date on these latter items and will present them to you not later than Monday, October 2, 1933.

60 Please advise us the date and hour suitable to you gentlemen to have a meeting in Birmingham to discuss each others pricing of the inventories and we shall be very glad to conform ourselves thereto.

Very truly yours,
ALABAMA POWER COMPANY,
By W. M. STANLEY
Vice President

CC- Mr. W. L. Farr, Mayor
Tuscumbia, Alabama.
Mr. W. H. Richeson, Pres. Brd. of Comm.,
Sheffield, Alabama.
BC- Mr. Lee Andrews
Mr. T. W. Martin
Mr. J. M. Barry
Mr. E. W. Robinson

61 Lide & Adler

Consulting and Constructing Engineers
Woodward Building
Birmingham, Alabama
Electrical, Mechanical and Civil Engineers
Industrial Architects

Martin J. Lide
Julian E. Adler

September 28th, 1933.

Mr. W. M. Stanley, Vice President,
Alabama Power Company,
City.

Dear Sir:—

This will acknowledge your letter of this date together with copies of inventories of your Sheffield and Tuscumbia properties which were delivered by messenger at noon.

We had expected that you would have named a price for your properties; this was our understanding following the Sheffield meeting of the 18th. Regardless, however, of any

misunderstanding following that meeting it would appear that this point was cleared up by our letter of the 22nd which was written following receipt of your Mr. Robinson's letter of the 20th to confirm our phone conversation following receipt of that letter. We quote from our letter as follows:—

"At the time of the conference with Mr. Stanley and others in Sheffield we understood that your inventory had been prepared. We stated at that time that we were prepared to consider a price from you, that we had our ideas of the value to the Cities of the usable portion of your system, and that we were prepared to recommend the purchase thereof if the price named by you was satisfactory." "We understand that you will pass this information on to Mr. Stanley."

We will be in your office at 9 A. M. next Monday,
62 October 2nd as agreed; we understand that you will be prepared at that time to name a price on your properties, and also your attorneys will be present and be prepared to agree upon the general terms of the proposed bonds.

Yours very truly,
LIDE & ADLER,
By JULIAN E. ADLER

Copies to
MR. RICHESON
MR. FARR

63 October 5, 1933.

City Commission,
Sheffield, Alabama.

Gentlemen:

I enclose copy of proposal for sale of our distribution system in Sheffield, the original of which was delivered to Messrs. Lide & Adler this morning in accordance with our agreement of October 2.

Yours very truly,
J. M. BARRY
Vice President.

JMB:h
Encl.
b/c- Mr. E. A. Yates
Mr. T. W. Martin
Mr. P. W. Turner
Mr. J. L. Andrews

64 October 5, 1933.

Mayor and Board of Aldermen,
Tuscumbia, Alabama.

Gentlemen:

I enclose copy of proposal for sale of our distribution system in Tuscumbia, the original of which was delivered to Messrs. Lide and Adler this morning in accordance with our agreement of October 2.

Yours very truly,

J. M. BARRY
Vice President.

JMB:h
Encl.
b/c- Mr. E. A. Yates
Mr. T. W. Martin
Mr. P. W. Turner
Mr. J. L. Andrews

65 Alabama Power Company

Birmingham, Alabama.

October 5, 1933.

Mayor and Board of Aldermen,
Tuscumbia, Alabama.

Attention Messrs. Lide & Adler, Engineers.

Gentlemen:

In accordance with your request, we are submitting the following proposal for the sale of our distribution system in Tuscumbia. Our willingness to sell the local distribution system grows out of the fact that our franchise has expired.

Properties included:

Tuscumbia primary, secondary, and street lighting distribution system complete; building and equipment of Tuscumbia city substation; but no land or right of way; all as agreed upon in detail between your Mr. Lide and our Mr. Robinson, and noted on our respective copies of the appraisal of our properties in Tuscumbia, dated September

30, 1933, made under the direction of J. E. Sirrine & Company.

Price: $104,000.00

In payment for the properties we will accept at par your revenue bonds bearing interest at four per cent, maturing in series in such amounts and at such times as may be mutually agreeable and secured by a first mortgage on the properties sold you. The mortgage will contain proper provision with respect to revenue bonds, adequate provisions for depreciation and maintenance, a provision for a thirty-year franchise in case of foreclosure, and such other provisions common to utility mortgages for the protection of the mortgagee. Details, covenants, conditions, etc., of the mortgage, together with the legality of the bonds, are to be subject to the approval of our counsel. The trustee in such mortgage shall be a corporation authorized to
66 act and mutually acceptable to the parties.

One of the problems with which we are faced is the release of the properties from the lien of our respective mortgages, to which consideration must be given in working out the details of the proposed mortgage.

We consider the price offered fair and reasonable for the adequate and well-maintained properties which we propose to sell. The distribution system has been almost completely rebuilt since we purchased the properties in 1925, as is clearly brought out by the fact that our actual cost of net additions and betterments to the properties which we propose to sell since their purchase in 1925 exceeds $88,000.

You will observe that the betterments made during our ownership of the property are almost equal to the price at which we have offered the property. In other words, we are disposing of a going property the greater part of which is practically new.

We are convinced that under present conditions of rising prices of commodities and labor a system as good as ours, exclusive of those parts of our system which you do not wish to purchase, could not be constructed for less than $116,000; particularly in view of the maximum hours and minimum wage scale now prescribed for both skilled and unskilled labor and the uncertainty of the cost of money.

We have not included in our price any element of sev-

erance damages and going concern value, which would be proper matters for consideration under the law in disposing of a going property. There is, of course, a real value to the City in taking over a going property, fully developed, with complete meter records, maps, load studies, etc.

As the Board is aware, we have freely made available to your engineers our distribution maps and other records, in order to furnish every possible assistance to you and them in reaching a conclusion in this matter. In order to get a disinterested viewpoint, we engaged the ser-
67 vices of J. E. Sirrine & Company to make an appraisal of the property which you are considering purchasing. A copy of this appraisal has been furnished your engineers. The reputation of Sirrine & Company throughout the South for accuracy and fairness is sufficiently well-known to require no comment from us.

In conclusion, we express our appreciation of the discussions with you and indulge the hope that the City will purchase our system at a definite and stated sum, rather than proceed with the construction of a new system, the cost of which is indefinite and unknown.

Yours very truly,

ALABAMA POWER COMPANY

By J. M. BARRY
Vice President

68 Alabama Power Company

Birmingham, Alabama

October 5, 1933.

City Commission,
Sheffield, Alabama.

Attention Messrs. Lide & Adler, Engineers

Gentlemen:

In accordance with your request, we are submitting the following proposal for the sale of our distribution system in Sheffield. Our willingness to sell the local distribution system grows out of the fact that our franchise has expired.

Properties included:

Sheffield primary, secondary, and street lighting system complete; II KV substations at King Manufacturing Company and Southern Cotton Oil Company; major portion of equipment at Sheffield city substation; part of 11 KV tap to King Manufacturing Company; part of 11 KV line on Sixth Street, Sheffield; 6.6 KV distribution line in Nyhoff subdivisions; but no land or right of way; all as agreed upon in detail between your Mr. Lide and our Mr. Robinson, and noted on our respective copies of the appraisal of our properties in Sheffield, dated September 30, 1933, made under the direction of J. E. Sirrine & Company.

Price: $164,000.00

In payment for the properties we will accept at par your revenue bonds bearing interest at four per cent, maturing in series in such amounts and at such times as may be mutually agreeable and secured by a first mortgage on the properties sold you. The mortgage will contain proper provision with respect to revenue bonds, adequate provisions for depreciation and maintenance, a provision for a thirty-year franchise in case of foreclosure, and such other provisions common to utility mortgages for the protection of the mortgagee. Details, covenants, conditions, etc., of the mortgage, together with the legality of the bonds,
69 are to be subject to the approval of our counsel. The trustee in such mortgage shall be a corporation authorized to act and mutually acceptable to the parties.

One of the problems with which we are faced is the release of the properties from the lien of our respective mortgages to which consideration must be given in working out the details of the proposed mortgage.

We consider the price offered fair and reasonable for the adequate and well-maintained properties which we propose to sell. The distribution system has been almost completely rebuilt since we purchased the properties in 1925, as is clearly brought out by the fact that our actual cost of net additions and betterments to the properties which we propose to sell since their purchase in 1925, exceeds $150,000.

You will observe that the betterments made during our

ownership of the property are almost equal to the price at which we have offered the property. In other words, we are disposing of a going property that is practically new.

We are convinced that under present conditions of rising prices of commodities and labor a system as good as ours, exclusive of those parts of our system which you do not wish to purchase, could not be constructed for less than $200,000, particularly in view of the maximum hours and minimum wage scale now prescribed for both skilled and unskilled labor and the uncertainty of the cost of money.

We have not included in our price any element of severance damages and going concern value, which would be proper matters for consideration under the law in disposing of a going property. There is, of course, a real value to the City in taking over a going property, fully developed, with complete meter records, maps, load studies, etc.

As the Board is aware, we have freely made available to your engineers our distribution maps and other records, in order to furnish every possible assistance to you and them in reaching a conclusion in this matter. In order to get a distinterested viewpoint, we engaged the services of J. E. Sirrine & Company to make an appraisal of the property which you are considering purchasing. A copy of this appraisal has been furnished your engineers. The reputation of Sirrine & Company throughout the South for accuracy and fairness is sufficiently well-known to require no comment from us.

70

In conclusion, we express our appreciation of the discussions with you and indulge the hope that the City will purchase our system at a definite and stated sum rather than proceed with the construction of a new system, the cost of which is indefinite and unknown.

Yours very truly,

ALABAMA POWER COMPANY
By J. M. BARRY
Vice President

71

Lide & Adler

Consulting and Constructing Engineers
Woodward Building
Birmingham, Alabama

October 5th, 1933.

Alabama Power Company,
City.

Gentlemen:

The undersigned, acting under authority vested by the City Commission of Sheffield, and by the Mayor and Council of Tuscumbia, hereby acknowledge for said cities the receipt of your tenders to sell your distribution systems in the respective cities, said tenders being signed by your Vice President, Mr. J. M. Barry, and dated October 5, 1933.

In behalf of said Cities, and subject to formal ratification by their governing bodies, we hereby respectfully decline the acceptance of your proposals and beg to submit for your consideration the following counter proposals:

1. The Cities are not in accord with the estimates of construction costs or the estimates of depreciation submitted in the appraisals of Messrs. J. E. Sirrine & Company. They are, however, willing to accept these appraisals as tentative bases of negotiation in an effort to be fair and reasonable.

2. The Cities feel that since you have no franchise they will be entitled to a thirty percent grant from the Government on a loan with which to construct a new system. They also feel that the depreciated existing systems cannot be worth more than the cost of new systems, which with the Government grant, cannot exceed seventy percent of their construction costs. They are, therefore, unwilling to pay for the usable portion of your distribution systems as set forth in your tenders, and as concurred in by the undersigned, more than seventy (70%) percent of their depreciated value as appraised by Messrs. J. E. Sirrine &
72 Co. They will, however, pay that much.

3. The Cities are unwilling to pledge under a mortgage lien a thirty year franchise. In event of foreclosure on account of default your position would revert to its present status by your taking possession of the property and operating it without a franchise as at present.

4. The Cities would not be willing to give you a closed mortgage on the properties since this would probably preclude the possibility of securing Federal Public Works funds for necessary extensions of the distributing systems. The Cities, however, would, subject to concurrence by the Public Works Administration, pay you with part of an authorized issue of 4%-20 year serial bonds, said issue being sufficient in amount to pay at par for the distribution systems purchased from you, and also to pay the cost of the immediately proposed additions and betterments necessary to adequately supplement the systems and to connect them with a source of power. The terms of the mortgage indenture must also provide means to finance future additions and betterments by the issuance of bonds under the same conditions as are stipulated in the indenture of the Alabama Power Company's 1967 Series of 4½% bonds.

5. The Cities shall be given the right, following the consummation and ratification of formal contracts by the parties hereto, embodying the provisions of this tender, and such other provisions as may be mutualy agreed upon, to take possession of the distributing systems and facilities as at present constituted and in active use. As a consideration for the use of the unpurchased parts thereof, the Cities will pay a monthly rental of 2/3rds of one percent of their appraised value for such period as may be required to complete the necessary extensions and additions to the municipal systems—said period to be not longer than one year from the final ratification of formal contracts by the
73 parties hereto; such ratifications shall not be unnecessarily or unreasonably delayed by any of the parties hereto.

6. The Cities request that a final answer be given by you, accepting or rejecting in toto the provisions of this tender, to the undersigned not later than 12 o'clock noon, Monday October 9th, 1933.

In behalf of the Cities and ourselves, we wish to express appreciation of the uniform courtesy and cooperation extended by the officers and members of your organization throughout these negotiations, and of the evident spirit of fair play and good will manifested by them. We further express the hope that these proposals may be acceptable to

your company, and that contracts fair to all parties may be speedily entered into.

Yours very truly,

LIDE & ADLER
By MARTIN J. LIDE

Copy to Mr. W. H. Richeson,
President, City Commission,
Sheffield, Ala.,

Copy to Mr. W. L. Farr, Mayor,
Tuscumbia, Ala.,

74 October 9, 1933.

Messrs. Lide and Adler, Engineers,
Woodward Building
Birmingham, Alabama.

Gentlemen:

We have your letter of October 5 relative to purchase of this company's electric distribution systems in Tuscumbia and Sheffield, and note that you require our acceptance or rejection of your terms and conditions without change by noon of October 9.

During the past thirty days an appraisal of these properties was made by J. E. Sirrine & Company, one of the outstanding engineering firms in the South and the proposals submitted by us were much lower than their appraisals less depreciation.

We gave serious thought and due consideration to the circumstances surrounding our position and to the facts mentioned in your letter and feel that we have made the respective cities fair and reasonable offers and are quite sure that in the end they will save money in accepting them.

We have adequate systems in these cities which we feel have been reasonably priced to you, the purchase of which would not result in a destruction of property and which would be of an immediate and continuing advantage to the cities. Feeling so, we cannot use a hypothetical net payment of 70% as a basis for selling these properties payable in 4% bonds at par. The outstanding bonds of both cities are now selling at a heavy discount; some of Tuscumbia's issues being in default of principal and interest.

You state the cities are unwilling to pledge under a mortgage lien a thirty-year franchise, and in event of foreclosure on account of default our position would revert to its present status of operating without a franchise. The failure of the mortgage to carry a franchise in case of foreclosure will force the purchaser at the foreclosure sale to scrap the properties unless a franchise could then be
75 obtained, which in effect would destroy the security. It is only reasonable to expect that if money is obtained from other sources by a loan secured by a mortgage on the system a franchise will be required for the protection of the lender.

If the cities desire to retain a position so as to be able to re-acquire the properties in case of a foreclosure, we are willing to incorporate a condition in the franchise whereby the cities will have an option at five-year intervals of purchasing the respective systems at an appraised value. Of course, if there is no default and foreclosure of the purchase money mortgage, the franchises would never become operative. Inasmuch as we are willing to accept the 4% bonds of these cities at par we cannot but feel that our position is fair and reasonable.

As to the form and conditions of the mortgage securing the purchase money you must appreciate that it is impossible to reach any definite arrangement until the plan and desires of the cities are more definitely known. In making our proposal, however, we purposely made these provisions as general as possible. We are entirely willing to cooperate with the cities in making the mortgage as flexible as reasonably possible as to the amount of each series of bonds and times of payment thereof and as to the refunding provisions. We are willing to defer the first payment on principal for two years after delivery of the property to the cities. We are also willing to incorporate in the mortgage provisions which would permit a foreclosure only after six months' default of an interest payment or of a principal payment, or upon failure for six months after written notice to comply with other provisions of the mortgage. Our counsel so expressed such willingness to your counsel at a conference held in the city of Sheffield on September 18. We, of course, cannot agree to accept a mortgage on the property which we are selling securing additional bonds

without knowing the amount of the bonds desired or
76 without some idea as to the nature of the bonds and the security desired by the Public Works Administration.

It is also a very unusual condition to require that we shall deliver possession of our properties upon the signing of the contract and before the details of the sale have been completed. This is such a radical departure from accepted business methods, we do not see how we could justify an acceptance of such a proposal. Again we call attention to the fact that one of the legal problems with which we are faced is the securing of a release from the lien *on* our mortgages on the property under discussion. This alone would prevent the acceptance of such a proposal.

In view of the fact that we are advised that your proposal must be accepted or rejected in toto, we regret that we have no alternative except to reject the same.

We entered into the negotiations for the sale of these properties in good faith upon the invitation of the governing bodies of these cities, believing that all parties concerned were interested sincerely in working out a mutually satisfactory purchase of these properties along sound business lines. We believe now that this may be done if regard for the equities involved are considered.

We hope that the conclusions as expressed in your letter are not as summary as indicated and that the cities will give consideration to the views expressed in this letter.

Yours very truly,
ALABAMA POWER COMPANY,
By J. M. BARRY,
Vice President

JMB:LTD

77 Lide & Adler
Consulting and Constructing Engineers
Birmingham, Alabama

October 12th, 1933.

Mr. J. M. Barry, Vice President,
Alabama Power Company,
City.

Dear Mr. Barry:—

We are pleased to acknowledge in behalf of our clients, the Cities of Sheffield and Tuscumbia, receipt of your letter of the 9th inst., replying to our letter of the 5th inst.

1. The Cities are strongly disposed toward acquiring your distribution systems by purchase, and are sympathetic with much that is in your letter, but in view of certain statements in your letter there does not appear to be any feasible plan by which this may be accomplished.

2. The Cities feel that while the prices you have named for the purchase of the systems are under ordinary circumstances not unreasonable, it nevertheless would be impossible to justify before their constituents the paying of more than seventy (70%) percent of the present value of the systems in view of the Government grants of thirty (30%) percent. After all, a thing is only worth the price at which it may be secured.

3. The Cities are adamant against pledging any franchise whatever in case of foreclosure. They feel that (a) it is not incumbent upon them to make this concession since it is not a condition of a Government loan for a new system, and (b) that if they did make the concession the P. W. A. would be almost certain to refuse to provide the additional funds required to extend and connect the systems to Government power.

Moreover it is very doubtful if the electorate would ratify the grant of a franchise.

4. The cities do not concur in your statement that
78 "the failure of the mortgage to carry a franchise in case of foreclosure will force the purchaser at the foreclosure sale to scrap the properties unless a franchise could then be obtained, which in effect would destroy the security." With no franchise granted to anyone your company could be the only possible purchaser at a foreclosure sale, and you could then operate just as you are now operating. Your position then would certainly be no worse than at present provided the property had been properly maintained, and the Cities would not object to setting aside a reasonable reserve for this purpose.

5. While we have not discussed the point with our clients, and cannot, therefore, predict their reaction to it, we nevertheless feel that it would be fair and reasonable for the Cities to agree, in event of foreclosure, not to grant a franchise to others than the mortgagee. We would be disposed to recommend such a provision in case agreement on all other points in disagreement would be promptly arrived at.

6. The points raised in the 7th paragraph of your letter are fair and conciliatory, and tend to facilitate agreement.

7. There was not misunderstanding with reference to the 8th paragraph of your letter. It was intended that you should deliver your properties after the signing of the necessary contracts and the completion of the details attendant thereon. This is the customary procedure in the transfer of real estate and it would, therefore, seem reasonable and customary in this instance. We did, however, attach the unusual provision of requiring a lease at a reasonable figure on the property in use but not purchased. In as much as this property consists largely of rights of way which would probably bring no rental whatever after the distribution system was sold, this proposal was believed to be fair and conciliatory.

8. The Cities have no desire to be summary and
79 abrupt in the termination of these negotiations. They appreciate the friendly cooperation and good faith which your company has displayed. They have, therefore, every desire to save your company from unnecessary loss if it can be arranged, but when it becomes evident, as it now appears, that the parties are hopelessly apart in their negotiations, it is to the interest of the Cities to terminate the negotiations as promptly as possible. We very much trust that you can appreciate their position, and that you can accept their views without further delay. If this acceptance is not promptly forthcoming we will be compelled to consider the negotiations as closed, and to take appropriate steps accordingly.

Yours very truly,

LIDE & ADLER
By MARTIN J. LIDE

Copies to Mr. W. H. Richeson,
President, City Commission,
Sheffield, Ala.,
Mr. W. L. Farr, Mayor,
Tuscumbia, Ala.,

80 Alabama Power Company
Birmingham, Ala.

October 20, 1933.

Messrs. Lide & Adler, Engineers,
Birmingham, Alabama.

Dear Sirs:

We acknowledge receipt of your letter of the 12th and thank you for the consideration given to the position outlined in our letter of October 9.

We are glad to note that the cities feel the prices we have named for the sale of the systems are under ordinary circumstances not unreasonable. We are not unmindful of the fact that the ultimate responsibility for acquisition of electric systems will rest with the governing bodies of the respective municipalities. However, we do know that we have made a fair and reasonable offer to the cities and can not see how we can justify making a thirty per cent. grant to them on the theory that the United States government is authorized to make a maximum grant of thirty per cent.

You state that after all, a thing is only worth the price at which it may be secured. While this is true, there is another factor to be considered; namely, does the thing desired to be purchased meet the requirements of the purchaser commensurate with the price paid? In case our properties are purchased, the cities will acquire systems in existence, at a fixed cost and on liberal terms. If the cities should be able to secure an equivalent number of dollars with the maximum thirty per cent. grant, still they would have no guarantee or assurance that those dollars would reproduce properties as good and efficient as those offered, especially in view of the uncertainties in the cost of labor and materials. On the other hand, these properties have a cash value to us, and the interest rate and the value of the bonds which we have offered to accept should be given consideration. Our money costs us more than four
81 per cent., which means that we should have to carry them at a loss, and of course we could not afford to dispose of the bonds at the prices which they would command under the present financial position of the respective cities.

We regret that the cities are taking the position in respect to the franchise s ıation indicated in your letter. As heretofore stated, we ____ that our offer in this respect is entirely reasonable, business-like and contemplated in the statutes authorizing the execution of such mortgages by municipalities. It must be borne in mind that our offer is to accept revenue bonds, and that the general faith and credit of, the cities are not to be pledged. If the operations by the cities succeed, of course the pledge of a franchise means nothing. If they are not a success, the holders of the bonds must look solely to the properties for their money, and can not require the cities to pay any deficiencies. On the other hand, the security for this kind of obligation is a mortgage on a going concern vested with the right to operate. We cannot see how anyone could object to giving the bondholders an opportunity to save themselves from a situation with which they will certainly be faced in case they are forced to take the property. It is certain that no private capital could afford to make additions and extensions to new customers without having a franchise running for a definite term. The cities would thereby be deprived of adequate service.

Under the circumstances, we are wondering if the real difficulty is not the lack of understanding by each party as to what the other party desires. We certainly are handicapped in not knowing just what arrangement the cities desire to make and, of course, just what will be acceptable to the Public Works Administration to supply additional funds. It may be that by a clearer understanding some agreement both as to price and security could be reached; therefore, before discontinuing these negotiations, would it not be wise for representatives of this Company and
82 representatives of the cities to get together to discuss the problems before us in an effort to work the matter out? We shall be glad to enter into such a conference at once.

Yours very truly,

ALABAMA POWER COMPANY

BY J. M. BARRY

Vice President.

83

Lide & Adler

Consulting and Constructing Engineers
Birmingham, Alabama

October 21st, 1933.

Alabama Power Company,
Mr. J. M. Barry, Vice President,
City.

Dear Mr. Barry:—

We acknowledge receipt of your favor of the 20th inst. in answer to our letter of October 12th, and desire to advise as follows:—

1. The Cities of Sheffield and Tuscumbia, through their representatives, will be pleased to continue discussions with your Company provided those discussions do not interrupt or delay the prosecution of their plans to acquire municipal electrical distribution systems. As set forth in previous letters from the Cities themselves, applications for Government loans have been pending since August 30th, and the moment satisfactory loans are granted negotiations for the purchase of the existing systems must automatically terminate in view of the time restrictions preparatory to beginning construction demanded by the Public Works Administration.

2. The Cities feel that past discussions have developed certain fundamental differences of view point which seem incapable of reconciliation. Both sides understand and appreciate these differences of viewpoint. We have endeavored to set them forth clearly in previous letters. Since neither side will yield, it is to the interest of the Cities to proceed with their plans without further delay.

3. While we feel that the prices named by you are under ordinary circumstances not unreasonable, we do not feel that the systems are bargains at these prices as compared with the cost of new systems. On the contrary a de-

84 tailed study convinces us that the present systems can be improved in many particulars by new construction.

4. The position taken in the fourth paragraph of your letter, while well stated, is open to attack from three quarters, as follows:—

(a) It ignores the equity rights of the Government which would hold part of the bonds and would, therefore, also be entitled to security in case of default. If you solely recaptured the system with a new franchise, the government rights would be infringed.

(b) It ignores the possibility of a practical substitute for the pledge of a francise as suggested in sections 4 and 5 of our letter of the 12th inst.

(c) It ignores the practical dangers attending clauses in contracts giving municipalities at stated intervals the right of recapture of franchises through purchase of systems, as clearly shown in 222 Ala. 689.

5. As representatives of the Cities, and subject to the limitations of Section 1 herein, the undersigned would be pleased to confer with representatives of your Company to discuss these problems with a view to solving them. For your information we would suggest that this be done very promptly however, since we are now taking active and definite steps to secure a Government loan.

Yours very truly,

LIDE & ADLER
BY MARTIN J. LIDE

Copy to Mr. W. H. Richeson
President, City Commission,
Sheffield, Ala.,
Mr. W. L. Farr, Mayor,
Tuscumbia, Ala.,

85 November 3, 1933.

City Commission,
Sheffield, Alabama.

Gentlemen:

Reference is made to the recent negotiations concerning the possible sale of our electrical distribution system to the City.

The principal point of difference between us has been the price for the properties which the City considered purchasing. The Company offered these properties for $164,000, which the City's engineers characterized as "under ordi-

nary circumstances not unreasonable." In other words, the City recognized our price as a fair one for the properties considered.

There seems to be no doubt that the City and the Company would have gotten together were it not for the fact that the N. I. R. A. provides for possible maximum grants of 30 per cent and loans of the remainder in public works expenditures. The potential grant of 30 per cent on new construction led the City to fix as the maximum price for our properties 70 per cent of the depreciated value as appraised by J. E. Sirrine & Company. This is tantamount to offering us $126,000 for properties which we have offered for $164,000. We have been unable to see the justice of this form of reasoning, and accordingly the City and the Company are still $38,000 apart.

We are still desirous of settling this matter to the satisfaction of both parties, for we feel that it is an economic waste to destroy a well-designed, adequate system and replace it with a new one that will do the job no better.

During the past week we have had an opportunity of examining the estimates of your engineers for the construction of a new system. It is our judgment that the new system will cost considerably more than the amount which your engineers estimate. If we are correct in this viewpoint, it of course places a different aspect, from your viewpoint, on the price which you would be willing to pay for our system. We ask that you re-examine this question.

86

We feel that the question of pledging a franchise does not present an insurmountable obstacle, and if we could reach an agreement as to the price, the matter of security could be solved in some way.

Feeling as we do as to the fairness of our offer, therefore, in a final effort to reach an agreement on the price, we suggest that the question of a fair price be referred to a group of three men, one to be named by the City, one by the Company, and one by the two so named. We agree to sell the property included in our offer (or any of the remaining property in our system in the City of Sheffield, if the City so desires) at the price named by such a group, regardless of what the price may be. If the City is disposed

to accep' this proposal, we are ready to proceed promptly and without delay.

Yours very truly,
ALABAMA POWER COMPANY
BY J. M. BARRY
Vice-President

cc—Messrs. Lide & Adler, Engineers,
Birmingham, Alabama.

87 November 3, 1933.

Mayor and Council,
Tuscumbia, Alabama.

Gentlemen:

Reference is made to the recent negotiations concerning the possible sale of our electrical distribution system to the City.

The principal point of difference between us has been the price for the properties which the City considered purchasing. The Company offered these properties for $104,000, which the City's engineers characterized as "under ordinary circumstances not unreasonable." In other words, the City recognized our price as a fair one for the properties considered.

There seems to be no doubt that the City and the Company would have gotten together were it not for the fact that the N. I. R. A. provides for possible maximum grants of 30 per cent and loans of the remainder in public works expenditures. The potential grant of 30 per cent on new construction led the City to fix as the maximum price for our properties 70 per cent of the depreciated value as appraised by J. E. Sirrine & Company. This is tantamount to offering us about $79,000 for properties which we have offered for $104,000. We have been unable to see the justice of this form of reasoning, and accordingly the City and the Company are still $25,000 apart.

We are still desirous of settling this matter to the satisfaction of both parties, for we feel that it is an economic waste to destroy a well-designed, adequate system and replace it with a new one that will do the job no better.

During the past week we have had an opportunity of examining the estimates of your engineers for the construc-

tion of a new system. It is our judgment that the new system will cost considerably more than the amount which your engineers estimate. If we are correct in this judgment; it of course places a different aspect, from
88 your viewpoint, on the price which you would be willing to pay for our system. We ask that you reexamine this question.

We feel that the question of pledging a franchise does not present an insurmountable obstacle, and if we could reach an agreement as to price, the matter of security could be solved in some way.

Feeling as we do as to the fairness of our offer, therefore, in a final effort to reach an agreement on the price, we suggest that the question of a fair price be referred to a group of three men, one to be named by the City, one by the Company, and one by the two so named. We agree to sell the property included in our offer (or any of the remaining property in our system in the City of Tuscumbia, if the City so desires) at the price named by such a group, regardless of what the price may be. If the City is disposed to accept this proposal, we are ready to proceed promptly and without delay.

Yours very truly,
ALABAMA POWER COMPANY
BY J. M. BARRY
Vice President

JMB:h

cc- Messrs. Lide & Adler, Engineers,
Birmingham, Alabama.

89 Lide & Adler

Consulting and Constructing Engineers
Birmingham, Alabama

November 4th, 1933.

Mr. J. M. Barry, Vice President,
Alabama Power Company,
City.

Dear Mr. Barry:—

Copies of your letters of November 3rd to the Cities of Sheffield and Tuscumbia are duly acknowledged.

We recognize in your letters, and believe the Cities also will recognize in them, an adroit maneuver to take out of our hands the conduct of the negotiations for the purchase of your systems, and to place those negotiations in hands such that the stalemate which has been in progress for about two months can be indefinitely maintained. With more than 80% of the Public Works money already allocated, we do not believe that the Cities will be caught in any such trap.

In the second paragraph of your letters we were correctly quoted, viz:—that the prices quoted by you are not, under ordinary circumstances, unreasonable. If you were operating under ordinary circumstances under franchises, your prices, in our judgment, would not be unreasonable; in that case the cities would not be entitled to grants. But you have no franchises. What you have been for weeks demanding is that the Cities make your Company a present of most of the 30% grant to which, under the law, they are clearly entitled.

As previously stated, we do not consider that your existing systems would be bargains at the prices named by you. A detailed investigation indicates clearly that the systems are not only inadequate in places, but that they could be materially improved by new construction. Furthermore, as previously stated, we are not in accord with the estimates of depreciation submitted by J. E. Sirrine & Co. We merely accepted their figures as a basis of negotiation in order to facilitate and expedite the negotiations.

For weeks you have been demanding that the Cities pledge a franchise in case of default. Are we now to understand from the sixth paragraph of your letter that you have withdrawn this demand? If so, we are at a loss to understand why, for several weeks, you were so insistent in your demand for a provision which you do not now enjoy. It seems to us that if you had been sincerely desirous of expediting the sale of your property, you would not have been obdurate in pressing a demand which was untenable, and which, in the end, you felt compelled to relinquish.

We also note your comments as to our estimates. If they are so low as you seem to think that fact will develop when

bids are received, and the Cities will be duly forewarned. The fact that our figures are within a few per cent of those submitted by J. E. Sirrine & Co., your appraising engineers, leads us to feel that they are sufficiently accurate.

Yours very truly,

LIDE & ADLER
BY MARTIN J. LIDE

Copies to Mr. Richeson, Sheffield,
Mr. Farr, Tuscumbia

91 John E. Delony, Jr.

Attorney at Law

Tuscumbia, Ala.

November 7th, 1933.

Alabama Power Company,
Birmingham, Alabama.

Gentlemen:

The City of Tuscumbia acknowledges receipt of your letter in regard to the appointment of three persons to determine the price to be paid for your municipal lighting plant in Tuscumbia.

The City Council discussed this matter and decided that this was not the proper way to determine this matter. They have this matter under advisement.

Respectfully yours,

JOHN E. DELONY, JR.

92 James M. Barry

Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Florence, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Florence, Alabama, to the city. This folder of correspondence was offered as Plaintiffs' Exhibit No. 2 and was received in evidence. Plaintiffs' Exhibit No. 2 contains the following letters:

93 LEE GLENN, President Board and Exo. Mayor.
City of Florence Alabama
Commission Government

Florence, Ala. July 20, 1933

Mr. Thomas W. Martin,
President, Alabama Power Co.,
Birmingham, Alabama.

Dear Sir:

The City of Florence has employed Mr. J. W. Johnson, of Florence, Alabama, to make for us an estimate of the cost of a new distributing system for Florence and an estimate of the value of the existing facilities of the Alabama Power Company.

The City Commission, when in your office some weeks ago, stated to you that if you would cooperate with us in appraising your distributing system that it would save us considerable money and at that time you stated that you would be delighted to do so, and assist us in any way possible. I assure you that this disposition on your part is very much appreciated by the City of Florence and the citizens of Florence.

Mr. Johnson informs me that to facilitate the valuation of the substations and of substation equipment that it would be of great value if you would permit us to examine the prints of the construction drawings of the two Florence substations and, if available, the bills of material and complete specifications covering the same.

I am informed that these prints, specifications and bills of material are in the Birmingha n office and that they might have to be sent to the Sheffield office for safe keeping and they would only be taken out of the office during brief periods in the field to facilitate the checking of equipment. We would take good care of the same and guarantee to return them in their original condition.

We would also like to request certain meter data, including the records of all meters which are served
94 through the Florence system. I understand that the route books for Florence are regularly kept in the

Huntsville office and that it might be inconvenient for you to have them outside of that office for any period longer than the time required for meter reading. We desire in no way to inconvenience you and if sending these meter records to the Sheffield office will cause you any inconvenience we would send a man to Huntsville to take the data we would require from the meter records.

We would like to request one blank copy of the several forms used in the meter route book in Florence and one blank copy of the forms for all power and primary metering apparatus for all power customers not included in the meter route book. We would like to request one copy of each of the forms used for the meter set records. If you would send us these blank forms at once it would enable us to print the forms necessary should we have to send men to Huntsville to make a copy of your meter books.

Cooperation by you in these matters will be a great favor to the City of Florence and would save us considerable expense and I assure you would be remembered should we engage in negotiations with you for the purchase of your system.

Yours very truly,

LEE GLENN

95 July 25, 1933.

Hon. Lee Glenn, President,
City Commission,
Florence, Alabama.

Dear Mr. Glenn:

Mr. Martin is away from the city, so I am taking the liberty of replying to your letter of July 20th to him, asking for certain information to assist your engineers in appraising the Florence properties.

Under separate cover, I am sending you copies of the plans and specifications of the two Florence substations. I believe that these will give you the information which you require. I should appreciate it if you would return these plans to me after they have served their purpose.

We shall be glad to assist in the compilation of meter data as requested in your letter of July 20th. We should

prefer to get up this information with our own clerks, in the form which you desire. I would suggest that one of your representatives go to Huntsville with Mr. Jackson and decide while there just what information is wanted and in what form. I think that this would be the most practicable plan.

While in Huntsville, your engineer could go over our various forms, and we shall be glad to furnish him copies of what he needs. We should also be pleased to explain to your representative the office routine in connection with customer's accounts.

I am enclosing copies of several of the forms in which you are interested.

Yours very truly,

J. M. BARRY,
J. M. BARRY,
Vice President and General Manager.

B/c—J. O. H.
—J. T. J.

96

November 16, 1933.

Hon. Lee Glenn. President,
City Commission,
Florence, Alabama.

Dear Mr. Glenn:

Reference is made to the recent discussion between the City Commission, the City's engineers, and representatives of this Company relative to the sale of our distribution system in Florence to the City.

The recent conference brought out widely divergent views of the City and the Company as to the portions of our system which would be usable to the City, and the present value of the properties to be sold. In order, however, that the matter be placed concretely before the City, we are submitting the following proposal for the sale of our property in Florence.

Properties Included:

Our complete distribution system in Florence, including 11000 volt and 2300 volt primary lines, secondaries, trans-

formers, services, meters, street lighting lines and equipment, and substations, except the following which you do not require:

(a) East Florence substation and lot.
(b) 44000 volt portions, and 1500 kva transformer bank at Florence Central substation.
(c) 11000 volt line from McFarland's Coal Yard to bridge.
(d) 11000 volt line on Tennessee River bridge.
(e) 11000 volt line to Rogersville.
(f) Weeden Heights distribution system.
(g) All "old style" meters.
(h) All "dead" new style meters.
(i) Telephone system.

Price: $195,000.

97 In payment for the properties we will accept at par your revenue bonds bearing interest at four per cent, maturing in series in such amounts and at such times as may be mutually agreeable and secured by a first mortgage on the properties sold you. The mortgage will contain proper provision with respect to revenue bonds, adequate provisions for depreciation and maintenance, a provision for a thirty-year franchise in case of forecloure, and such other provisions common to utility mortgages for the protection of the mortgagee. Details, covenants, conditions, etc., of the mortgage, together with the legality of the bonds, are to be subject to the approval of our counsel. The trustee in such mortgage shall be a corporation authorized to act and mutually acceptable to the parties.

One of the problems with which we are faced is the release of the properties from the lien of our respective mortgages to which consideration must be given in working out the details of the proposed mortgage.

We consider the price which we have made a fair and reasonable one. J. E. Sirrine & Company, independent engineers with widespread experience in appraisal work, estimated the present value of the properties which are offered for sale to be more than $230,000. We are aware of the fact that your engineers anticipate an extremely heavy increase in load under municipal operation and for this

reason are inclined to depreciate heavily various items of the existing system. Although we expect to see domestic consumption increase year by year, we do not agree fully with your assumptions in this respect; therefore, we can not subscribe fully to your views as to the adequacy of our system in Florence. We feel that the existing system will, with moderate additions and betterments, take care of the requirements of Florence for many years to come.

98 As a partial measure of the reasonableness of our offer, we mention the fact that our actual net cost of additions and betterments to the properties which we propose to sell, since their purchase in 1925, amounts to more than $165,000.

The Commission is aware that we have freely made available to your engineers our maps, blue prints, various records, and the Sirrine appraisal of our Florence system, in order to furnish them every possible assistance in reaching a conclusion in this matter.

In considering the construction of a new system, we are sure that the Commission and its engineers will weigh fully the present trend of labor and materials, particularly on P. W. A. work. It may be of interest to note that, according to press reports, the minimum labor rates of P. W. A. work in Alabama were only yesterday revised upward for a number of crafts.

We take this opportunity of expressing to the Commission our appreciation of the uniformly cordial relations which have marked all our discussions.

Yours very truly,

ALABAMA POWER COMPANY
By .....
Vice-President.

99 James M. Barry

Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Decatur, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Decatur, Alabama, to the city. This folder of correspondence was offered as

Plaintiffs' Exhibit No. 3 and was received in evidence. Plaintiffs' Exhibit No. 3 contains the following letters:

100 January 19, 1934.

City of Decatur,
Decatur, Alabama.

Attention Mr. James A. Nelson, Mayor

Gentlemen:

We acknowledge receipt of your letter of January 11 referring to our recent contract with the Tennessee Valley Authority, under which we agreed to negotiate for the sale of our electric distribution systems to the municipalities in a certain area in Alabama. Decatur is included in the area referred to.

We shall be glad to discuss this matter with representatives of the City at a convenient time in the near future. We suggest some day during the week beginning January 28. We shall be glad to have representatives go to Decatur, or, if you prefer, the City's representatives could meet us in our office in Birmingham. Please let us know your wishes in the matter.

Yours very truly,
ALABAMA POWER COMPANY
BY J. M. BARRY,
Vice Pres. & Gen. Mgr.

b/c- Mr. Martin
Mr. Stanley
Mr. Yates

101 City of Decatur Alabama

January Eleventh,

1 9 3 4.

Alabama Power Company,
Birmingham, Alabama.

Gentlemen:

Attention: Mr. Thos. W. Martin, President:

We understand that in your recent contract with the Tennessee Valley Authority, you allotted this territory exclu-

sively to them to serve electric energy and that you agreed to begin negotiations with the municipalities within in an effort to convey your distribution systems to them.

If it your desire to negotiate with the City of Decatur please advise us.

CITY OF DECATUR
BY JAMES A. NELSON
Mayor

C. C:Francis & Haley,
Engineers,
334 Brown-Marz Bldg,
Birmingham, Alabama.

102 City of Decatur Alabama
January Twenty-Two,
1934.

Alabama Power Company,
Birmingham, Alabama.
Attention: Vice Pres. & Gen. Manager.

Gentlemen:

In reply to yours of 19th:

It will be necessary that the entire City Council participate in the negotiations concerning your electric distribution system, and following your suggestion as to time, the City Council will meet your representatives at the City Hall, in Decatur, any day of the week, beginning January 28th, except February 1st.

Kindly notify me exactly which date will suit your convenience.

Very truly yours,

JAMES A. NELSON
Mayor

103 January 24, 1934

Hon. James A. Nelson, Mayor,
City of Decatur,
Decatur, Alabama.

Dear Sir:

Replying to your letter of January 22 with reference to negotiations concerning our electric distribution system in

Decatur, our representatives will be pleased to meet your City Council at the City Hall in Decatur on Friday, February 2 at 11 A. M. Kindly let me know if this date and time suit your convenience.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

104 City of Decatur Alabama
January Twenty-Six,
1934.

Mr. J. M. Barry,
Vice Pres. & Gen. Mgr.,
Alabama Power Company,
Birmingham, Alabama.

Dear Sir:

Reply to yours of 24th:

The date, Friday, February 2nd at 11 A. M., is entirely satisfactory for conference between your representative and City Council.

Yours very truly,

JAS. A. NELSON
Mayor

105 February 5, 1934.

Mr. T. M. Francis, Consulting Engineer,
Birmingham, Alabama.

Dear Mr. Francis:

In accordance with our understanding, I am enclosing herewith valuation of our electric distribution system at Decatur, giving the replacement cost as of December 1, 1933. This valuation was prepared by experienced valuation engineers and is based on a detailed field inventory and a careful pricing based on the then current labor and material prices for this class of work. You will observe that the replacement cost as of December 1, 1933, of the physical properties embracing the distribution system is $359,809. These are the properties which we have offered to sell to the City

The valuation does not include a number of items used and useful in connection with our operations at Decatur. Some of these items will be conveyed to Tennessee Valley

Authority under our agreement of January 4, and other items, such as organization expense, taxes during construction, and going-concern value, which are elements of value of a going property, have not been included in the figure of $359,809 mentioned above.

In case we negotiate the sale of the distribution system to the City of Decatur, we should of course not desire to retain other properties in Decatur useful in the operation of such system after ceasing to do business there. We should like to have the City take over such properties on a mutually satisfactory basis. Among these properties are the following:

Warehouse building and site.
Tools and testing equipment
Transportation equipment
Office furniture and improvements.
Merchandise stock
Materials and supplies.

106 The items listed above have a replacement cost as at December 1, 1933, of $54,485. There seems to be absolutely no question that certain of these items should be taken over by the City when it begins operating the local system, and we very much hope that the City will see the wisdom and fairness of buying them all.

If you have any questions in connection with this valuation, we shall be very glad to go over them with you in detail.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

JMB:h
Encl.

107 City of Decatur Alabama

February 8, 1934.

Alabama Power Company,
Birmingham, Alabama.

Attention of Mr. J. M. Barry, Vice-President.

Gentlemen:

Since your meeting with us on February 2, the City Council has conferred, and it occurs to us that *is* should not be

very difficult to determine the present day value of the property which you propose to convey to the City of Decatur.

The City is not in position to make a cash offer. The best and only thing we can offer you is bonds secured by the revenue from the operation of the system. Under these conditions we trust that these terms will be agreeable to you.

Please let us have your decision as promptly as possible in order that we may proceed further with these negotiations.

Yours very truly,

JAMES A. NELSON,
Mayor.

JAN:C
CC:
T. M. Francis
Paul J. Haley

108 February 15, 1934.

Mr. James A. Nelson, Mayor,
Decatur, Alabama.

Dear Mr. Nelson:

I wish to acknowledge receipt of your letter of February 8 relative to the position of the City with respect to our recent offer to sell our distribution system to the City.

We believe, as you do, that it will not be difficult to agree upon a price for the properties which would be satisfactory to both parties.

We are sorry to note that the City is not in a position to make a cash offer, and we hope in this connection that the City will investigate further the possibility of securing funds from either Government or other sources. We regret very much that the Company can not accept the revenue bonds of the City in payment for its properties.

As I explained to the Mayor and Council in our meeting of February 2, our company is constantly in need of funds for the continuing requirements of its business. During 1933, for example, the worst year of the depression, the Company expended for improvements and betterments, and extensions in the ordinary course of business, more than $500,000. The State regulatory laws are such that the Company is allowed to earn not more than a fair return on the reasonable value of its property. In recent years its return has been less than this. The Company's securities

have depreciated in price to such an extent that it would be impossible for us to raise money through the sale of securities. The loss of territory in Northwest Alabama will of course impair our earnings to a considerable extent. Looking at these facts squarely, we feel sure the City will appreciate the reasonableness of our position in requiring the payment of cash for those properties which we propose to sell.

109 We assure you of our desire to carry out fully the spirit of our contract with Tennessee Valley Authority, and we sincerely hope that the City will find a source of funds with which to pay for our property in Decatur. We look forward to a continuance of negotiations.

I am enclosing copy of the valuation which I handed to Mr. Francis on February 5; also copy of my letter of transmittal to Mr. Francis.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

JMB:h
cc-Mr. T. M. Francis
Birmingham, Ala.

110 James M. Barry: Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Russellville, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Russellville, Alabama, to the city. This folder of correspondence was offered as Plaintiffs' Exhibit No. 4 and was received in evidence. Plaintiffs' Exhibit No. 4 contains the following letters:

111 City of Russellville
Russellville, Ala.

January 19, 1934.

Mr. Thomas W. Martin, President,
Alabama Power Company,
Birmingham, Ala.

Gentlemen;

We understand that under your agreement with the Tennessee Valley Authority it is contemplated that you will sell your municipal distribution system to the municipalities.

We would be pleased to enter into negotiations with you for the purchase of your distribution facilities in and around Russellville, and suggest a conference at the earliest possible date.

We will appreciate a prompt reply.

Very truly yours,

W. W. RAMSEY
Mayor

CC-Tennessee Valley Authority.
Knoxville, Tenn.

112 January 24, 1934

City of Russellville,
Russellville, Ala.

Attention Mr. W. W. Ramsey, Mayor

Gentlemen:

We wish to acknowledge receipt of your letter of January 19, addressed to Mr. Martin, referring to our agreement with the Tennessee Valley Authority under which it is agreed that we negotiate for the sale of our electric distribution systems to the municipalities in a certain area in Alabama. In your letter you express a desire to enter into such negotiations for the distribution facilities in and around Russellville and suggest a conference at an early date.

We shall be pleased to discuss this matter with your representatives at a convenient time in the near future. Owing to other engagements, it would be difficult for us to meet with you before Tuesday, February 6. Please let us know if this date will be satisfactory. We shall be glad to have representatives go to Russellville, or, if you prefer, the City's representatives could meet us in our office in Birmingham. Kindly let us know your wishes in this matter.

Yours very truly,

ALABAMA POWER COMPANY
By J. M. BARRY
Vice Pres. & Gen. Mgr.

113 City of Russellville
Alabama

January 29, 1934.

Alabama Power Company.
Birmingham, Ala.

Attention Mr. J. M. Barry, V-Pres & Gen/Mgr.

Gentlemen;

This will acknowledge receipt of your letter of January 24, in answer to *ouy* January 19th., letter addressed to Mr. Martin, with reference to your agreement with the Tennessee Valley Authority.

We would be pleased to have your representative meet with the Mayor and City Council in Russellville February 6th.

If this date is possible with you we will try to be ready for your representative by 10 o'clock A. M. Feb. 6th.

Kindly advise if this date is agreeable with you,

Very truly yours

W W RAMSEY
Mayor.

CC: Tenn. Valley Authority.
Knoxville, Tenn.

114 January 30, 1934.

Mr. W. W. Ramsey, Mayor,
City of Russellville,
Alabama.

Dear Sir:

In answer to your letter of January 29, we shall be pleased to get with the Mayor and City Council in Russellville on February 6. It would perhaps be better to fix the time at 10:30 or 11 A. M., as we shall probably drive up from Birmingham that morning.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

115 City of Russellville Alabama

January 31, 1934.

Alabama Power Company,
Birmingham, Ala.

Attention Mr. J. M. Barry, Vice-President & Gen. Mgr.

Gentlemen:

This will acknowledge your letter of January 30th., advising that you will meet with the Mayor and City Council at 10:30 A. M. February 6th, 1934.

The Mayor and Council will expect you and will be ready at that time to go into the matter thoroughly with you.

Very truly yours,

W W RAMSEY
Mayor.

CC; Tennessee Valley Authority.
Lide and Adler, Engineers.

116 James M. Barry. Whereupon the witness identified a folder of letters as the correspondence between Alabama Power Company and the City of Hartselle, Alabama, with reference to the negotiations between the city and the company for the sale of the company's distribution system in Hartselle, Alabama, to the city. This folder of correspondence was offered as Plaintiffs' Exhibit No. 5 and was received in evidence. Plaintiffs' Exhibit No. 5 contains the following letters:

117 The Thomas Abstract Company

Abstract Books for Morgan and Limestone Counties
Abstractors
Decatur, Alabama

Rutledge S. Thomas
Manager. December 22nd, 1933.

Hon. Chas. H. Eyster
Decatur, Alabama.

Dear Mr. Eyster:— Re-Minutes City of Hartselle

Regarding the Minutes of the City of Hartselle concerning the call of election, etc., in a recent Municipal Power Election. I called at the office of the City Clerk of Hartselle, to-day, and asked to see these Minutes, but he advised me

that the Minutes of the City Council were not available at this time and would not inform just where they were at this time.

I am very sorry that I am unable to furnish you with certified copy of the information you desire.

If I can be of further service advise me,

Very truly yours

RUTLEDGE S. THOMAS.

118 December 22, 1933

Mayor and Members of the
City Council of the
City of Hartselle, Ala.

Gentlemen:

On December 21st, 1933, an effort was made by and through a reputable representative of the Alabama Power Company to review the minutes of the City Council of the City of Hartselle, and to obtain certified copy of the minutes relating to the proceedings of the City of Hartselle in passing resolutions or ordinances to call an election for the purpose of borrowing money to build, acquire, etc., an electric distribution system.

Request was also made for an examination of the books of the City of Hartselle for information showing amount of cash receipts for the year ending September 30, 1933, also cash disbursements for the year ending September 30, 1933, and the amount of indebtedness of the City of Hartselle on September 30, 1933, and the amount of return for assessment for 1933, and the tax rate prevailing at Hartselle for said year.

These requests were made by representatives of the Alabama Power Company a tax payer of your city.

The requests are hereby respectfully renewed for information on the several questions above outlined and stated.

In making this request, it is entirely agreeable for one or more representatives of the City to be present at all times, and to assist in compiling the information.

The information the Alabama Power Company is requesting, is such information as it is advised is public information, and available upon the request of any tax payer.

The Alabama Power Company as a Tax payer is respectfully requesting herewith that it be given the above information promptly.

Very respectfully,

119 ALABAMA POWER COMPANY
By CHAS. H. EYSTER
Attorney

120 December 23rd. 1933.

Mr. W. H. Stewart, City Clerk,
Hartselle, Alabama.

Dear Will:

I have considered the written request presented by the Alabama Power Company for certain information from the records of the City of Hartselle.

No reason is assigned for the request. I understand, of course, the records of a municipality are in their nature public records and subject to inspection by anyone who has any reason to inspect the record, but I doubt if the municipality is required to submit its records to a person making the request for the submission unless some valid reason is assigned, however, from what you tell me, I assume the request is made in connection with the application of the city to the Alabama Advisory Board of the Public Works Administration for a loan to be used in the establishment of an electric lighting system. You tell me all the information requested is now in the hands of the Advisory Board, but that this board under instructions from the Public Works Administration declings to submit the information to the Power Company. There must be some valid reason why the administration is unwilling to submit this information, and in view of this fact it occurs to me that it would be better for the Power Company to first remove this objection and let the information requested come directly from the Advisory Board. In view of this peculiar situation, I hope the Power Company will withdraw its request and, if it has not already done so, submit its reasons for the information to the Administration, and I am sure if the reasons are valid the Administration will withdraw the order to withhold this information.

I notice from the press that requests are being made upon other municipalities which have applications for loans for power purposes. I do not know what attitude these
121 municipalities will take. I would not want to advise you to go contrary to their attitude.

I am sending you a copy of this letter in order that you may furnish it to the Power Company.

Yours very truly,

TT/B TENNIS TIDWELL.

122 City of Hartselle
Hartselle, Alabama

January the Ninth 1934

Alabama Power Company,
Birmingham, Alabama.

Gentlemen:

Under the contract entered into by and between your company and the Tennessee Valley Authority, it is our understanding that the following is stipulated:

Alabama Company covenants and agrees to convey its urban distribution systems in the above named counties in Alabama, said distribution systems being listed in Exhibit B, to the respective municipalities in or adjacent to which such systems are located, together with all franchises, contract rights, and going business thereto appertaining, when it has agreed with any such municipality on the price to be paid for the same. Alabama Company agrees to make every reasonable effort to come to an early agreement with said municipalities for such sales. In the event that any such municipality is unable to arrive at a satisfactory price after three months of bona fide negotiations with Alabama Company, or if some other reason the sale of any such system cannot be consummated, Authority shall have the right to serve such municipality or municipalities irrespective of whether such municipalities have purchased the distribution system from Alabama Company. Authority covenants and agrees to use its best endeavors to assist in bringing about the purchase of such distribution systems by the respective municipalities at fair prices.

The citizens of this municipality have voted affirmatively in a recent election on the question of acquiring an electrical

distribution system. The City has filed with the Federal Emergency Administration of Public Works an application for a loan with which to construct such a system. It is our desire to make use of your present distribution facilities in-so-far as possible, and to that end we request that you advise us promptly under what terms and conditions you will sell us your existing distributive system. We will assume that your price will be determined by the appraisal method; the question of terms and conditions of payment, however, must be such that it will be possible for us to comply therewith. In other words, as you no doubt appreciate, we cannot sell securities in the open market to raise cash with which to buy your system. Will you consider accepting from us in payment bonds secured by a mortgage on the system? If you will consider the acceptance of such securities, can you indicate the rate of interest that you would expect them to bear, and also over what period of years you would expect them to mature?

123

If you would prefer a conference to discuss these matters instead of answering any of the above questions specifically, will you kindly name the date and the place that we can confer so that this matter can be expedited as much as possible.

We will appreciate a prompt reply.

Yours very truly,

CITY OF HARTSELLE
By J. P. HODGES
Mayor

CC: Lide & Adler,
Birmingham, Ala.

CC: Tennessee Valley Authority,
Knoxville, Tenn.

124

January 13, 1934

City of Hartselle,
Hartselle, Alabama.

Attention Mr. J. P. Hodges, Mayor

Gentlemen:

We wish to acknowledge receipt of your letter of January 9 calling attention to the contract recently negotiated between certain Southern power companies and the Ten-

nessee Valley Authority under which we agreed to negotiate for the sale of our electric distribution systems in a certain area in Alabama. In your letter you express a desire to purchase our distribution system in Hartselle and ask us to advise you promptly under what terms and conditions we will sell our system.

Your letter correctly quoted the provision of the contract concerning the proposed sale of our distribution systems, and we shall proceed as promptly as possible with negotiations with Hartselle. Preliminary to these negotiations, we are now having made an accurate inventory and appraisal of the Hartselle distribution system. We anticipate that it will take at least two weeks to complete this appraisal. As soon as it is complete we think that it would be desirable to have a conference between representatives of the City and of the Company in an effort to reach a mutually satisfactory agreement as promptly as possible.

We regret that we cannot give you a definite answer at this time concerning your questions as to the terms and method of payment for the system. We are glad to consider your suggestions and will be in a position to discuss them fully with you at our first conference.

It would be very helpful if you would kindly send us complete information concerning the financial status of the City of Hartselle, so that we shall have an opportunity to go over this in anticipation of our first meeting.

125 As soon as the appraisal of our system in Hartselle is ready, we shall advise you promptly and request a conference.

Thanking you for your letter, we are,

Yours very truly,
ALABAMA POWER COMPANY
By J. M. BARRY
Vice President

126 February 8, 1934

City of Hartselle,
Hartselle, Alabama.

Attention Mr. J. P. Hodges, Mayor

Gentlemen:

Reference is made to your letter of January 9 and our reply of January 13 concerning conference to discuss pos-

bama. Plaintiffs then introduced this map as Plaintiffs' Exhibit No. 6 and it was received in evidence.

(Here follows Map marked Page 130.)

131 James M. Barry. Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not wish to cross-examine him, and the witness was dismissed.

Whereupon the plaintiffs offered in evidence certificates of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company, conferring upon the company right to build the dams that were licensed by the Federal Power Commission.

"Mr. Turner. They are offered for the purpose of proving that we have certificates of convenience and necessity in Alabama.

• • • • • • • • • • •

"The Court. I should assume that they are proper for the purpose of showing that the company had obtained the requisite certificates under the State law as a condition precedent to the construction and operation of its plants. Isn't that what you want?

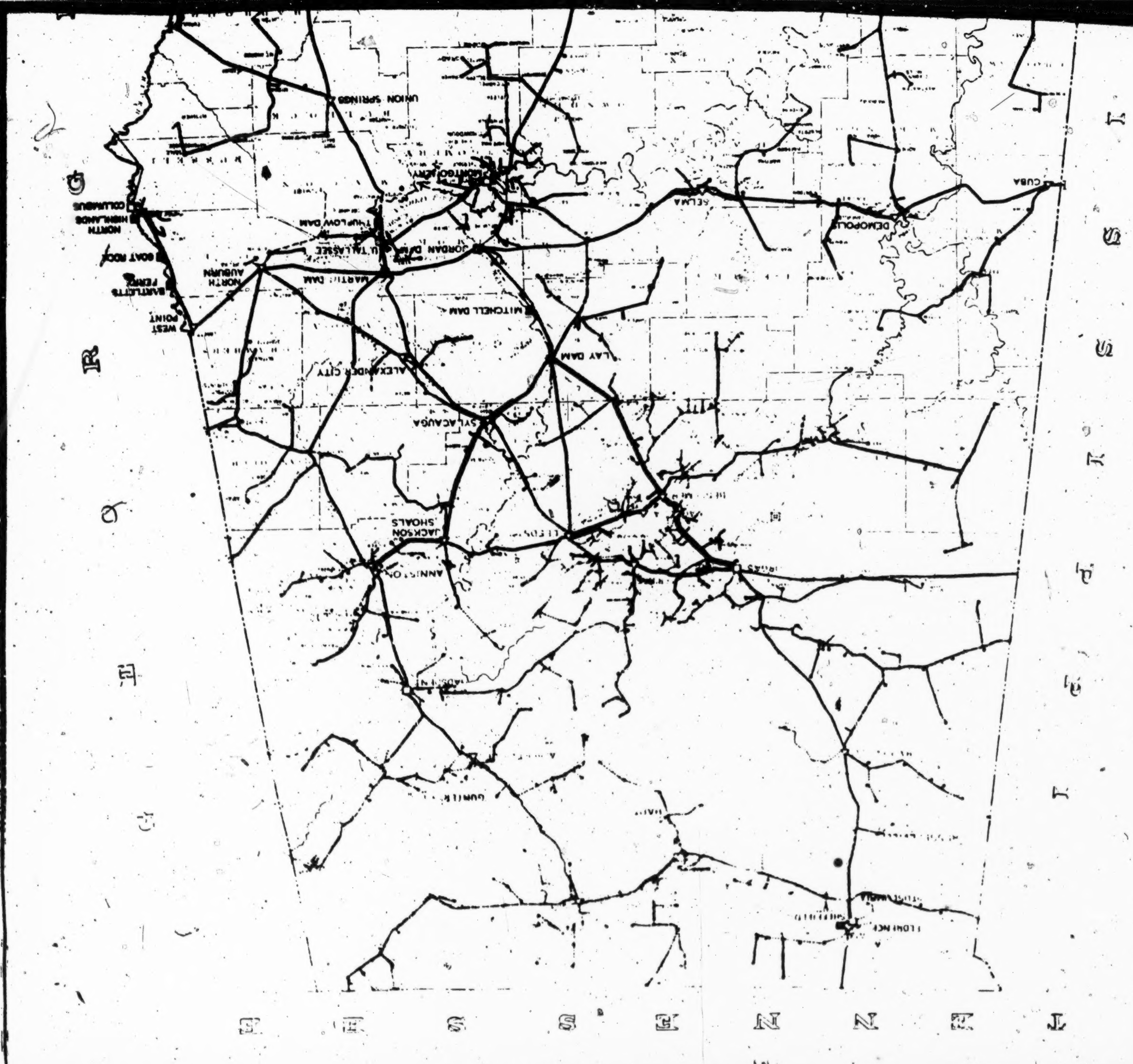
"Mr. Turner. That is the purpose.

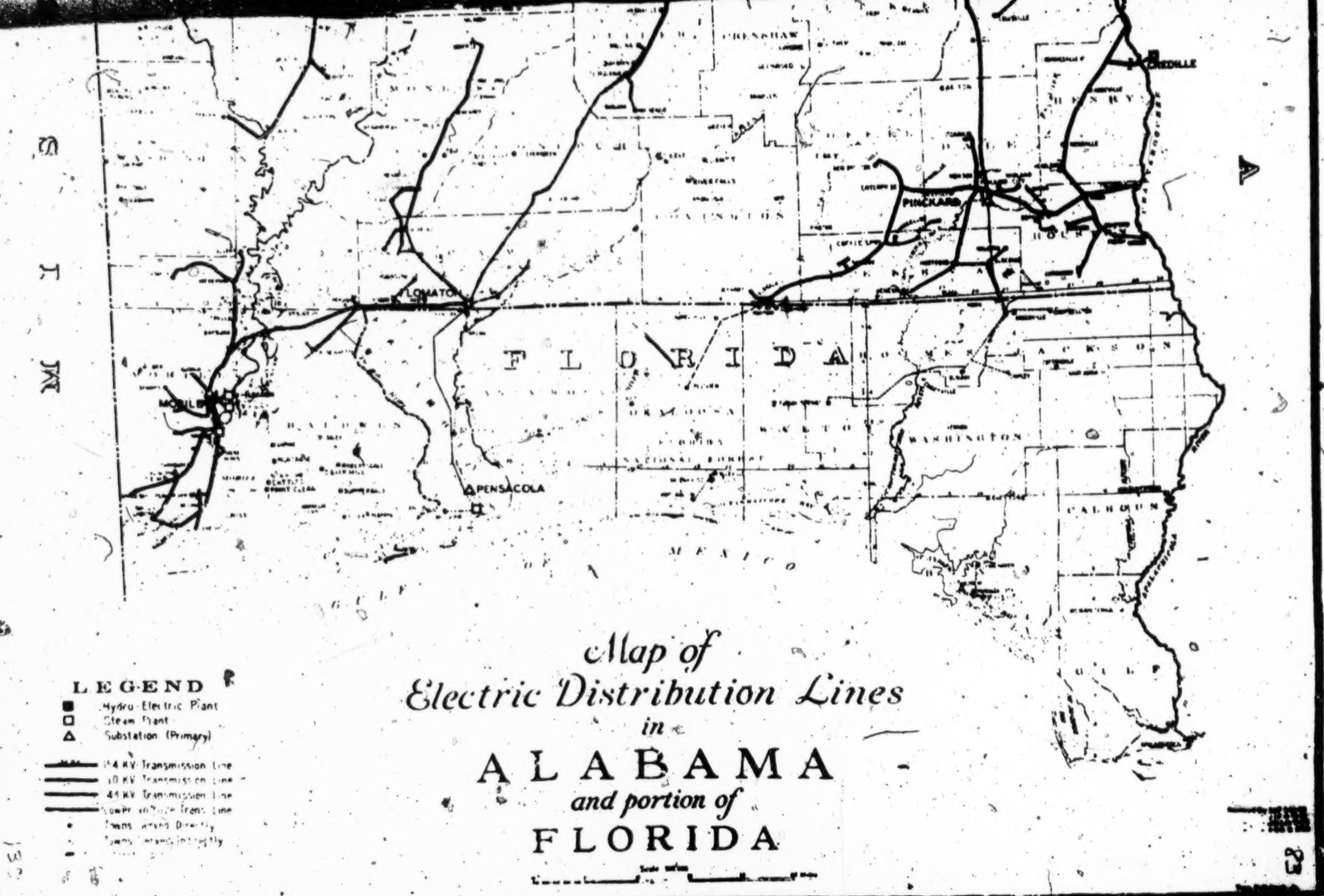
"Mr. Scott. Is the offer conditioned that it is for the purpose of showing only the authority and not for the recitals contained therein?

"Mr. Turner. Yes, we limit it to that purpose. We limit to the purpose stated by his Honor.

"Mr. Scott. Then that is all right."

Whereupon the plaintiffs offered the certificate of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company for the construction and operation of Mitchell Dam, being Docket No. 3059, which certificate was marked as Plaintiffs' Exhibit No. 7, and was received in evidence. In this certificate the Alabama Public Service Commission found that the Mitchell Dam project of Alabama Power Company "is a well-considered one and is peculiarly fitted to tie into
132 its present development and one that will conserve the water resources of the region and while being an


UNION SPRINGS
MONTGOMERY
SELMA
CUBA
DEMOPOLIS
COLUMBUS
NORTH HIGHLANDS
THURLOW DAM
JORDAN DAM
TALLASSEE
BOAT ROCK
BARTLETTS FERRY
NORTH AUBURN
MARTIN DAM
WEST POINT
MITCHELL DAM
LAY DAM
ALEXANDER CITY
SYLACAUGA
JACKSON SHOALS
ANNISTON
GUNTER
ELDRIDGE
R
T



Map of Electric Distribution Lines in ALABAMA and portion of FLORIDA

83

sible sale of our electrical distribution system in Hartselle to the City.

Representatives of the Company would be glad to meet with the Mayor and Council of the City of Hartselle on some mutually convenient day next week. We suggest Tuesday, February 13, at 10:30 A. M. We shall be glad to go to Hartselle for this conference, or if you prefer, it can be held at our office in Birmingham. If February 13 is not satisfactory to the City, another date may easily be agreed upon. Kindly let us know your wishes in the matter.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

JMB:h
b/c-Mr. Stanley
Mr. Bingham
Mr. Weiss
Mr. Shepard

127

City of Hartselle
Hartselle, Alabama

February 8th, 1934

Alabama Power Company,
Birmingham, Alabama.

Attention Mr. J. W. Barry, Vice President

Gentlemen:—

We, again, take the liberty of writing and inquiring as to when we may expect a conference with you, regarding the purchase of your electric distribution system, located in the City of Hartselle.

In your letter of January 13th, 1934, you anticipated that the appraisal of your system would require two weeks and upon completion, a conference would be in order.

This letter is prompted by the fact that a period of three weeks has elapsed since receipt of your letter of January 13th, without advice from you regarding a date for the conference.

Thanking you for a reply at your earliest convenience, we are.

Yours very truly,

CITY OF HARTSELLE
By J. P. HODGES
Mayor

128 February 9, 1934.

City of Hartselle,
Hartselle, Alabama.

Attention Mr. J. P. Hodges, Mayor

Gentlemen:

I wish to acknowledge receipt of your letter of February 8, which evidently crossed in the mails my letter of the same date. For your convenience, I am enclosing carbon copy of my letter.

Yours very truly,

J. M. BARRY
Vice Pres. & Gen. Mgr.

129 City of Hartselle
Hartselle, Alabama
February 10, 1934.

Alabama Power Company,
Birmingham, Alabama.

Attention Mr. J. M. Barry, Vice President

Gentlemen:—

In acknowledgement to your letter dated February 8th, with reference to a conference to discuss possible sale of your electrical distribution system.

It will be convenient for representatives of the City of Hartselle to meet in your office in Birmingham on Tuesday, February 13th at 10:30 A. M.

Yours very truly,

By direction
W. H. STEWART, *Clerk*

130 James M. Barry. Whereupon the witness identified the following map as a true and correct map of Alabama Power Company's system in the State of Ala-

aid to navigation will enable petitioner to produce at a reasonable cost a large quantity of power to feed into its extensive system," and, also found "That it is to the best interest of all concerned that the contemplated improvements as detailed in the petition be made as speedily as possible.

Whereupon the Plaintiffs offered a certificate of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company and Alabama Interstate Power Company, with respect to the transfer and assignment by the Alabama Interstate Power Company to the Alabama Power Company of all the rights, powers and authority theretofore granted by the Commission to said Alabama Interstate Power Company under and by virtue of the certificate of convenience and necessity issued by this Commission on September 8, 1932, insofar as it affected the construction of a power project at the location of one of the dams across the Tallapoosa River, namely, Cherokee Bluffs, (Martin Dam), being Docket No. 4279. This certificate was received in evidence as Plaintiffs' Exhibit No. 8. In this certificate the Alabama Public Service Commission found "that it is to the best interest of the petitioners, the public, and all parties concerned that the transfer and assignment by said Alabama Interstate Power Company to Alabama Power Company of said rights, powers, and authority be made as contemplated by said petition."

Whereupon plaintiffs offered the certificate of convenience and necessity issued by Alabama Public Service Commission to the Alabama Power Company and the Alabama Interstate Power Company for a hydroelectric development on the Tallapoosa River for the construction and operation of four dams across the Tallapoosa River, being Docket No. 4279. This certificate was received in evidence as Plaintiffs' Exhibit No. 9. In this certificate the Alabama Public Service Commission found "That the pro-
133 posed plan is well-considered and will make available a large amount of power for the operation of the several proposed power plants in conjunction with the power developments of the Alabama Power Company in this region so as to secure as great benefit as possible from the stored waters; that a plan for thus coordinating these several developments will be best adapted to developing, conservation and utilization in the public interest the navi-

gation and water resources of the region; and that the storage reservoirs proposed by petitioner should have an important effect in minimizing damage for flood conditions", and, "That it is to the best interest of all parties concerned that the contemplated improvements as proposed in the petition be made."

Whereupon plaintiffs offered in evidence a certificate of convenience and necessity issued by the Alabama Public Service Commission to the Alabama Power Company for a hydroelectric power development on the Coosa River near Wetumpka, Alabama, being Docket No. 4681. This certificate was received in evidence as plaintiffs' Exhibit No. 10.

In this certificate the Alabama Public Service Commission found "that the construction of the dam, powerhouse and other works necessary or incidental to said development and for the construction of necessary transmission lines to connect said proposed power houses with the system of Alabama Power Company so that power generated at said proposed power house may be transmitted through its distribution system to the public, is reasonably necessary for the convenience of the consumers and the public; that the applicant has complied with all the laws of Alabama, with the administration of which this commission is charged."

Whereupon **Edgar W. Robinson** was called as a witness for and on behalf of the plaintiffs and having been first duly sworn, was examined and testified as follows:

134 *Direct examination*

I am connected with Alabama Power Company in the capacity of superintendent of transmission and distribution. I am familiar with the distribution system of Alabama Power Company in the seven towns involved in this litigation. All of them are supplied from our transmission system which includes high voltage lines from our generating plants up to the various load centers, which include the towns in litigation, and several substations which reduce the voltage from the transmission voltage to distribution voltage, which is 11,000 volts or 2300 volts. In each of these towns we have a modern and more or less conventional distribution system consisting of primary stations, overhead pole lines, transformers, secondaries, services and feeders, all being the usual adjuncts of a distribution system. Each

of these seven distribution systems is adequate to take care of our present demands in these places, and most of them have considerable surplus capacity. These systems are all very well maintained. I am familiar with the company's personnel in each of these seven cities. Florence; Sheffield and Tuscumbia are operated as a district and in that district we have 28 local employees, and from time to time, emergency employees in varying numbers. At Russellville, we have 9 regular employees. At Decatur we have 28 regular employees. At Hartselle we have 3 regular employees and at Guntersville, 2. In addition to those local employees, there are certain divisional employees whose duties cover the whole northern division. These cities are in the northern division of the company. Our operations are split up into six divisions, this area being about half of the northern division. There are about 20 divisional field employees who spend a portion of their time in this area and whose duties lie in this area. In addition to these there are certain divisional general employees, part of whose
135 duties lie in this area and in these seven cities. Our company personnel is filled at the present time. We have all the employees we need.

Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not wish to cross-examine him and the witness was dismissed.

Whereupon **Fernand Carl Weiss** was called as a witness for and on behalf of the plaintiffs, and, having first been duly sworn, was examined and testified as follows:

Direct examination

I am connected with the Alabama Power Company in the capacity of manager of engineering and construction. I have been with Alabama Power Company about 22 years. I am an electrical engineer I am familiar with the construction of Lay Dam, Mitchell Dam, Jordan Dam and Martin Dam, and, I am familiar with the drawings relating to the navigation on the three dams on the Coosa river. I was familiar with them while they were being constructed. I am familiar with the extent of the excavation work done by the company for locks and canals at Mitchell and Jordan Dam. The Mitchell Dam space was excavated at the East end, east abutment, and temporary closures were made in

such a manner that a lock could be constructed around this section. Heavy rock fills were placed on which timber cribs were constructed in a manner to conform with the requirement of the Army engineers at this point. Surveys were made of the river channel at the upper end of the reservoir made by Mitchell Dam and plans for an 8-foot channel were laid out to permit navigation to extend up to the upper dam, which is Lay Dam. This direct construction work was undertaken at a cost of $70,466. The lands for these lock facilities, approximately 40 acres, were provided by the Alabama Power Company at and around the abutment of Mitchell Dam. At Jordan Dam, the next one down
136 stream on the Coosa River, a 60-foot concrete channel was constructed through the west abutment of the dam, and was temporarily closed. This abutment was so built that lock gates could later be installed without injury to the dam. An approach channel was excavated for a distance of 2400-feet and to a width of 150-feet at the bottom. A portion of the lock wall was also constructed by the power company. This work involved excavation in excess of 198,000 yards of dirt and 41,700 yards of rock, and the placement of 41,300 yards of backfill and over 9,000 yards of concrete, all this being done in accordance with the requirements for lock provisions in this structure. These provisions for the lock at Jordan Dam alone, cost Alabama Power Company $334,301. I have estimated the cost to the Alabama Power Company to meet the requirements in the Federal Power Commission licenses, providing for the maintenance of gauges and lighting Government houses at those locks, and for power to actuate the locks when put in. The gauging stations, for gauging the flow of the river, have been erected. As we constructed dams down river, we had to replace the gauging station which was then farthest down stream with a new one. The ones now in service on the Coosa River include a gauge at Childtonsburg and one below at Jordan Dam. There is a gauging station on the Alabama River near Montgomery and two gauges on the Tallapoosa River, one at Wadleigh and one below Thurlow Dam. These gauge stations cost Alabama Power Company in excess of $7,100 and entail to the company a current annual operating and maintenance expense in excess of $2,500. The contingent liability of Alabama Power Company for lock

operations and facilities for the lock tenders for Lay Dam is 290 H. P.; for Mitchell Dam, 285 H. P.; for Jordan Dam, 600 H. P., making a total of 1,175 H. P., which will cost Alabama Power Company around $300 per H. P. investment cost.

Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not wish to cross-examine him and the witness was dismissed.

Whereupon **James A. Emery** was called as a witness on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination

My name is James A. Emery and I live in Montclair, New Jersey, a suburb of New York City. I am Senior Vice-President of Ford, Bacon & Davis, Inc., whose business is general engineering. The firm was established in 1894 and conducts a general engineering business in industrial and public utilities properties, covering engineering, designing, construction and management. The firm engages in appraisal and valuation of properties, which is a very important part of our work.

I was graduated from the Massachusetts Institute of Technology in 1893 as a civil engineer. I was engaged in the Institute for one year thereafter as an assistant instructor. Then I was engineer and draftsman for companies making street railway special track work. Then I conducted an independent engineering office in Boston. Since 1898 I have been almost continuously associated in this engineering work with Messrs. Ford, Bacon and Davis of New York, and the successor corporation, Ford, Bacon & Davis, Inc. During all that period I have had to do with valuations of all kinds of properties, and principally with public utilities properties. I have had experience as an operator of public utilities, being for four years engaged in charge of the operation of the Birmingham Railway Light & Power Company in Birmingham, Alabama, operating all of the electric light, electric railway and gas facilities in Birmingham.

I have made an appraisal of the properties of Alabama Power Company involved in this litigation, which properties are located in the cities of Florence, Sheffield, Tus-

138 cumbia, Rusellville, Decatur, Hartselle and Guntersville. I made a valuation of the property of the company in those seven cities. Our valuation of this physical property of Alabama Power Company in Florence amounts to $271,066; in Sheffield, $227,840; in Tuscumbia, $121,800; in Russellville, $121,684; in Decatur $299,885; in Hartselle $62,174; in Guntersville, $83,057; the total being $1,187,206. I have made a study of the damage that would result to the remaining system if the properties of Alabama Power in these seven cities are separated from the company's system.

"Q. What do you find to be the damage to the remaining part of the system by reason of the severance of these seven towns?

"Mr. Scott. We object to that, if the Court please, because it is incompetent, irrelevant and immaterial, it calls for a conclusion of this witness. No foundation has been laid in his testimony of speculative damages projected into the future.

"The Court. I will overrule the objection.

"Mr. Scott. We will note an exception.

"(By Mr. Turner)

"Q. State what you found? "A. The total estimate of damages to the remaining property is $704,073."

Cross-examination

I did not, and never have, made an appraisal of all of the company's property. These particular appraisals, with the exception of Guntersville were made in 1935 on the request of the Chemical National Bank in connection with its trusteeship. I have not made a more recent appraisal, with the exception of Guntersville properties of the company. I personally made the appraisal of the going concern value and of the severance damages. I was in direct charge of the work of physical appraisal but did not have anything to do with the details.

"By the Court:

"Q. In estimating the damage you testified to,
139 how did you go about it? What does that really mean? A. It covers briefly the loss that the company will suffer with respect to certain of the property in the territory that is to be taken, such as a loss on its real es-

tate; namely, that it would not pay to sell the real estate for its value as an operating property. It would be subjected to some loss in the removal of fixtures and supplies.

"It would be at a loss with respect to the use of a high-tension transmission line that serves many of those places. That is, if this load is taken off, its full use cannot be obtained again.

"It will suffer a loss with respect to the carrying charges on that portion of its power-production facilities and transmission facilities that are made idle until such time as the other load grows sufficiently to absorb it.

"It will also lose the cost of that certain general property, which cost or proportion of cost has been absorbed by the business in these towns.

"It will also suffer a loss by reason of certain of the general expenses, a proportion of which is now carried by the business in these towns and which will be thrown back on the remainder of the system until such time as the system grows sufficiently to cover the loss or offset the loss.

"Q. The value of these properties in these seven towns you have stated to be about $1,100,000. If those properties, having that value, were severed from the rest of the company's plant in Alabama, your estimate would be that the rest of the plant would be worth some $700,000 less than it is now? A. Yes.

"Q. That is the theory of it? A. That is right, your Honor."

140 *Re-direct Examination.*

James A. Emery. There has not been a substantial change in prices going into electric distribution systems since my appraisal of these properties in 1935.

Re-cross examination

I did not make any estimate of damages in case of competition from another plant. My entire conclusion as to damage has to do with a complete severance of these plants now in operation. My estimate is based on the assumption that the entire property of the company, property and business, in those towns would disappear. My estimate is based upon the resultant damage that would be caused by the erection in any of these towns of a municipal power plant which

would compete and take all the business. It is an anomalous condition in these days to have two electric distribution systems competing with each other indefinitely in places like Florence, Sheffield, Tuscumbia, Decatur, Hartselle, Guntersville and Russellville. I assume that the company would rather take its loss than spend money fighting it indefinitely. Assuming that a municipal plant is erected in each of these cities and that they are in competition with the distribution systems therein operated by Alabama Power Company, and further, assuming that the rates charged for power by the municipally operated plants higher than the rates charged by Alabama Power Company, the company would still suffer some damage. I do not know what the damage would be under such assumed conditions and have made no estimate concerning same.

Whereupon the plaintiffs having finished with the witness, the defendants stated that they did not have any further cross-examination to make of him and the witness was dismissed.

Whereupon plaintiffs offered the application of
141 the city of Decatur, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $285,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 11. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as plaintiffs' Exhibit 14. The following statements, among others, are contained in Plaintiffs' Exhibit No. 11:

"(c) *Economic and Social Value:* The present electric light and power distribution system is being operated by public utility. The construction of a municipal system would be of great economic and social value to the inhabitants of the community.

In the first place, the construction would put many unemployed men to work.

In the second place, the distribution of cheap power from the Tennessee Valley Authority will cause a large increase in the use of power in the homes and by industry. The larger use of power in the homes will tend to reduce drudg-

ery, increase conveniences and make for a happier home life.

The larger use of power by industry will tend to increase pay rolls, which in turn will increase the demand for business and professional service.

The successful application of the cheap TVA power will tend to reduce electric light and power rates in other communities.

IV. (d) *Relation to General Plant:* The project
142 is in line with the National Plan to promote the happiness and prosperity of the people by making available cheap electric power.

(e) *City or Regional Planning Roard:* There is no city Planning Board. Decatur is in the Tennessee Valley and is within the area to be served by the Tennessee Valley Authority. The Authority has indicated willingness to supply power if the city can secure the funds with which to construct the distribution system.

(f) *Metropolitan District:* The city is an independent community and this question is not applicable.

(g) *Endorsements:* The citizens of Decatur endorsed the project in an election held on October 31, 1933 by a vote of 1,415 to 501. The Mayor and Counsel are unanimously in favor of the Project.

(h) *Objections:* No objections have been filed with the city authorities.

(i) *Competition:* The project will compete with a similar enterprise of Alabama Power Company, unless its distribution system should be taken over.

(j) *Status of Project:* Surveys, estimates and specifications have been made.

Bids can be received within three weeks after the approval of the loan and grant and the funds made available. Construction can begin within ten days after letting of contract and can be completed in eight months.

(k) *Number of Men Employed:* It is estimated that an average of 100 men will be employed directly on the work for a period of eight (8) months and that employment will be given to about 300 men for the same period, for the manufacture of equipment and material.

(l) *Priority of Project:* In view of the fact that
143 Decatur is right on the Tennessee River, is only 45

miles from Muscle Shoals (only 20 miles from Wheeler Dam); is the largest city on the Tennessee River below Chattanooga; and the people are so overwhelmingly in favor of cooperating with the Administration by making use of TVA power, it seems that this project should be given prior and preferential consideration.

(m) *Sequence:* There is no dependent construction. A house to house canvas has been made, which indicates that more than 95% of domestic, 70% of commercial, and 75% of industrial consumers will take power from the municipal plant on TVA rates as soon as service can commence.

(n) *Regenerative Character:* It is expected that the application of Cheap TVA electric power rates will cause the purchase and use of electrical appliances for household use, which will stimulate the manufacture and sale of such articles.

In our estimate of labor, Page 3 section (b) and Page 4 section (k), we assumed an average employment of 50% skilled and 50% unskilled labor.

The low TVA rates will tend to bring in new industries. This of course will call for the employment of both skilled and unskilled labor in construction of plants and housing for employes.

(o) *Permanence:* The construction of the project as submitted will take care of the needs of the community for some months. With relatively small outlays (which can be taken care of out of current earnings) the project will answer the needs of the community for many years.

* * * * * * * * *

144 (r) *Unemployment:* There are about 1,000 unemployed persons in the City, and the County Emergency Relief Committee has been spending about $12,000.00 per month on relief.

(s) *Incidence of material Orders:* Except untreated lumber, sand and gravel all material must be secured from without the County. Cement, iron roofing, and treated poles normally come from Birmingham, Alabama. Electrical equipment and supplies and copper wire come from the north and east. Gas and oil come from Louisiana and Texas.

* * * * * * * * *

Estimating operating expenses for the System is shown below in detail for the year 1935, the first full year of operation:

Power at Wholesale from TENNESSEE VALLEY AUTHORITY:
$38,058

* * * * * * * * *

V. (d) *Discussion of Estimated Revenue and Expense:* The financial table indicates a reasonable margin of surplus during the life of the loan. The increases in the revenues shown are in line with the expected development of the area as the Community gets to using TVA cheap power.

* * * * * * * * *

(e) *Schedule of Rates:* The following are the rates to be charged. These rates may be changed by the Municipality with the approval of TENNESSEE VALLEY AUTHORITY, provided no rate shall be higher than the rate for similar service authorized by Alabama Public Service Commission for public utility.

TVA Rates are attached.

* * * * * * * * *

145 (1) *Receipts and Expenditures of the City:* The budget of the city has been balanced for many years. There is nothing to indicate that the present current expenditures will exceed the prudently estimated ordinary revenues, and the assurance is given that the budget will be balanced. Below is a table showing the receipts and expenditures for the past four years:

	1930	1931	1932	1933
Revenues	$154,915.24	$143,045.35	$127,447.15	$125,900.49
Expenditures	127,941.23	155,047.16	103,073.46	97,848.53
Surplus	26,974.01		24,373.69	28,051.96
Deficit		12,001.81		

(Thereupon follow details)

(m) *Description of City:* • • • • •

Decatur is 40 miles East of Muscle Shoals and only 20 miles from Wheeler Dam. The completion of the Wheeler Dam will make possible water transportation the year found.

• • • • • • • •

334 Brown Marx Building,
Birmingham, Alabama,
December 14, 1933.

Honorable Mayor and Council,
City of Decatur, Alabama.

Gentlemen:

We have made field surveys, studies, investigations and estimates for a proposed Municipal electric light and power distribution system for your City, including a line and distribution system for Austinville.

The proposed system covers the entire business and residential section of Decatur and Austinville.

146 It is estimated that the distribution system will cost $371,743.00, of which $285,000.00 is to be a loan and $86,743.00 is to be a grant from the Federal Government.

Details of the estimated cost are as follows:

(Thereupon followed the tabulated details of cost)

• • • • • • • •

We have gone very carefully into the matter of power rates, both wholesale and retail.

We feel that our estimates of expected Revenue are ultra-conservative: We took the actual customers who signed request for you to construct a municipal distribution system and figured the bills on the proposed TVA rates. We assumed an annual increase of only 5% of this number for the first five years, which brings the number of customers only to the number of buildings now wired for electric service.

Our estimates indicate that with the extremely low retail TVA rates the operation of the municipal system will pay all operating costs, the amortization of the loan within 20 years, all State, County, School District, and City taxes

and licenses at same rates as public utility, and then have a comfortable surplus each year.

In addition the consumers will have a saving of about 40% on their power bills.

On account of the fact that an intensive appliance campaign is being projected by the TENNESSEE VALLEY AUTHORITY to put energy consuming devices on the market, we feel that within a few months the energy consumption by domestic consumers will be largely increased.

* * * * * * * * *

147 The amount of $38,058 for power at wholesale from TENNESSEE VALLEY AUTHORITY on the application of Decatur, Alabama, is for energy to be purchased at their regular quoted schedule, as follows:

1,810 K.W. demand		@ .90	$1,629.00
100,000 k.w.h. energy		@ .004	400.00
200,000 "	"	@ .003	600.00
217,000 "	"	@ .0025	542.50
517,000	Total per month		$3,171.50
	Total per year		$38,058.00

* * * * * * * * *

We are advised by the TENNESSEE VALLEY AUTHORITY that transmission lines will be run into the city and the main part of the sub-station supplied by T.V.A., including the step-down transformers at no cost to the city. They propose to furnish the current and meter on the low side of the main transformers at a distribution voltage of approximately 2300 volts.

* * * * * * * * *

It seems very desirable that the distribution system be constructed at once for several reasons:

1. To put men to work.

2. To cooperate with TENNESSEE VALLEY AUTHORITY in making available cheap power rates to the residents of the community.

3. Because loans and grants are available from the Federal Emergency Administration of Public Works on liberal terms.

We recommend that you immediately take the necessary steps to apply for a loan of $285,000 and a grant of
148 $86,743 from the *Federal Emergency Administration of Public Works.*

Assuming favorable action on the loan and grant we recommend that you contract for power from TENNESSEE VALLEY AUTHORITY for power at wholesale.

Respectfully,

T. M. FRANCIS.
PAUL S. HALEY.
Consulting Engineers."

(The application also pointed out a large amount of bonds and notes of the city that were in default both as to interest and principal.)

Whereupon Plaintiffs offered the application of
149 the city of Guntersville, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $100,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 12. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiffs Exhibit No. 12:

"II. *Summarized General Information:*

* * * * * * * *

d. Consulting Engineer: Lide & Adler, Woodward Building, Birmingham, Alabama.

* * * * * * * *

IV. *Project:*

a. *General description:*

The project under contemplation will consist of a complete and new electric light and power distribution system for a city of about 3000 population. It is proposed that the distribution system be energized from a transformer sub-

station located near the center of the city, which sub-station will be furnished by the Tennessee Valley Authority and supplied by them with energy from Muscle Shoals and Wheeler Dam.

The distribution system is intended to practically suplicate and supplant a public utility distribution system. The city has secured ten year contracts from practically all of the consumers now in the city, which contracts read as follows:

(Thereupon follows the Contingent Power Con-
150 tract which is exactly the same as the one set forth in Exhibit 14 herein)

The estimates of cost and of earnings are based upon the signed customers. Some of these customers are at present disconnected. Inasmuch, however, as this loan is for a long period, these customers will be connected to the system when normal business resumes, and especially when cheap power is offered. It is proposed to construct a new system complete without removing the old system.

It is also proposed to construct a central distributing sub-station near the center of the city, which sub-station will be equipped with transformers furnished by the T.V.A.

* * * * * * * * *

b. *Estimates of the Cost of the Project:*

* * * * * * * * *

The cost estimates are based upon the number of consumers signed up and upon their classification. The loads of the industrial consumers were ascertained by inspectors. The consumption of the domestic and commercial consumers is predicated upon a return to normal business conditions and upon the normal stimulation of consumption by the low promotional rates to be put into effect by the T.V.A.

* * * * * * * * *

Economic and Social value of the project:

c. The lower rates resulting from this project will stimulate the industrial and commercial development of the city, and with the use of household electrical appliances the drudgery of house-keeping will be greatly relieved,
151 thus improving home life for the residents.

d. The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the regions within transmisson distance of the Muscle Shoals power development.

. . . . . .

f. The city is an isolated town on the Tennessee River, and is a part of the T.V.A. project.

. . . . . .

i. The project will not be competitive since practically all of the consumers are signed up for a ten (10) year period.

. . . . . .

The field and office labor incident to the work will entail about 20% of the total cost, or about $20,000.

. . . . . .

V. *Revenues & Expenses:*

. . . . . .

b. The estimated income is predicated upon the assumption (a) of a return to normal business conditions during the period of the loan, (b) that the town will not grow in population during this period, and (c) that the low T.V.A. rates will stimulate customer consumption. These assumptions seem conservative.

. . . . . .

Much of the present industrial load is seasonal, which will have the effect of increasing the KW demand and decreasing the load factor of the city's purchased power. The T.V.A. power demand rates to municipalities, however, provide for this contingency so that the annual weighted
152 demand will not be greatly increased.

. . . . . .

The annual weighted demand is estimated at about 500 KW. On the basis of 500 KW and 1,348,000 KWH per year, the cost of T.V.A. power would be $10,800 per year.

. . . . . .

Jan. 10, 1934

Mr. George J. Davis, Jr.
State Engineer,
Alabama Advisory Board,
Federal Emergency Adm. of P. W.
Montgomery, Alabama.

Dear Mr. Davis:—.

IN RE: Application of Guntersville, Alabama for loan for construction of electrical distribution system.

This is in reply to your favor of December 29, 1935, requesting additional information in connection with the above application.

* * * * * * * * *

III. It is estimated that about 20% of the customers signed up to take power from the municipal plant are at present not taking service from the existing utility system. This is due largely to the general economic conditions and the high existing rates for electric energy.

* * * * * * * * *

It is anticipated that greatly increased consumption of electricity will arise from the promulgation of the
153 low T. V. A. rate schedules, in connection with the projected Electrical Home & Farm Appliance, Inc., which will enable the residential customers to buy electric appliances and thereby increase their demands.

* * * * * * * * *

The annual weighted demand is estimated at about 450 KW. On the basis of 450 KW and 888,000 KWH per year, the cost of T.V.A. power would be about $8,400.

* * * * * * * * *

The above tabulation is predicated upon a grant of 30% of the cost of labor and material, which will enable the municipality to make effective immediately the low rates, in cooperation with the Tennessee Valley Authority's program. This grant, as shown above, will carry the project thru its period of development. If the grant is applied as shown above, there will be a fair margin of safety even under the conservative estimates of income.

* * * * * * * * *

If there is any further additional information desired we will be glad to supply same upon request.

Yours very truly,

LIDE & ADLER

By JULIAN E. ADLER

JEA/T

Whereupon plaintiffs offered the application of the
154 city of Florence, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $486,122.48 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 13. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiffs Exhibit No. 13:

"IV. THE PROJECT:

a. *General Description:*

* * * * * * *

The present distribution system is supplied by two transmission lines which connect with the Alabama Power Company's transmission network through the high tension substation, now leased by the United States to the Alabama Power Company, which is located near the Steam Plant of U. S. Nitrate Plant No. 2.

* * * * * * *

It was the intention of the City of Florence, until very recently, to purchase such of the existing distribution equipment as could be advantageously used in the municipal distribution system, and to repair and extend the usable portions of the existing system to make them conform to the service and capacity requirements of the City's proposed distribution system. A detailed survey was made of the existing system by the Consulting Engineer for the City of Florence to determine the value of the existing system and the value of such of the existing properties as the

City of Florence might advantageously use as a part of the municipal distribution system. The survey revealed:

That much of the existing system will not fit into the plans of an independent municipal system such as the City of Florence will require; that the condition of the existing system is, in general, very poor because of deferred maintenance; that the usable properties, if acquired by the City, will require very extensive repairs and enlargements to put the system in a proper serviceable condition and to provide the capacity for the increased demands which lower rates will induce; that the present value of such of the existing equipment as the City could advantageously use, when due account is taken of depreciation and obsolescence, is less than 40% of the value which the Alabama Power Company places on the same equipment.

In view of the foregoing, it appears that no satisfactory negotiations, which will be acceptable, to the City of Florence, can be effected with the Alabama Power Company for the purchase of any considerable portion of the existing distribution system. Therefore, the Board of Commissioners of Florence propose that the City should build an entirely new Electric Distribution System which would be better adapted to the operating and service requirements of the City than is the existing system. THE FRANCHISE, UNDER WHICH THE ALABAMA POWER COMPANY HAS BEEN PERMITTED TO OPERATE THE ELECTRIC DISTRIBUTION UTILITY IN FLORENCE, ALABAMA, EXPIRED MARCH 12, 1933. A SIX MONTHS EXTENSION OF THE FRANCHISE, WHICH WAS GRANTED, EXPIRED SEPTEMBER 12, 1933. SINCE THE LATTER DATE, THE ALABAMA POWER COMPANY HAS BEEN OPERATING THE ELECTRIC UTILITY IN FLORENCE WITHOUT A FRANCHISE AND AT SUFFERANCE ON THE PART OF THE CITY.

Upon completion of the new system, the City will declare the existing equipment of the Alabama Power Company, which is in a very poor state of repair, to be a public nuisance, and compel them, under existing Alabama law, to remove their equipment from the streets of Florence.

The new system which the City of Florence proposes to build, as compared to the existing system, will have greater capacity and will permit of more flexible and more reliable operation.

* * * * * * * * *

c. *Economic and Social Value:*

* * * * * * * * *

The residents of Florence and of the Muscle Shoals District have, for more than a generation, been cognizant of the enormous industrial possibilities of this section, which awaited only the economical development and proper disposition of the power potentialities of the Tennessee River. These people have given tremendously of their time and money in their effort to promote the proper development and utilization of the power resources of the Tennessee River, and particularly for the development of Wilson Dam, which is situated contiguous to the corporate limits of Florence, and Dam No. 3, which will be located about 16 miles upstream from Wilson Dam.

They were encouraged to believe when Wilson Dam was begun and completed by the Government that their
157 objective was in sight and that the low cost power, which had been for so long a time their vision and hope, was to be made available at rates which would stimulate industrial development and permit greater use of electricity in the homes.

Since the completion of Wilson Dam in 1925, it has been operated by the Government, but the efforts of the private power companies and an administration sympathetic with the purpose of the power interests, have delayed the realization of the hope for cheaper power, which the people of this district have so long fostered and labored for.

The present Government has recognized the principle that the people have a right to be served through Government agencies with the power produced from Government owned and operated power plants, and has accordingly created the Tennessee Valley Authority to perform this function. The State of Alabama has likewise enacted legislation which recognizes this right, and enables towns and cities in Alabama to own and operate municipal distribu-

tion plants, and also enables them to be served from government operated generating plants.

The rates now being charged for electricity in Florence, Alabama are in excess of the schedules which are suggested and approved by the Tennessee Valley Authority for resale by municipalities.

Because of the close proximity of Florence to the Wilson Dam Hydro-Electric Plant, which is now being operated by the Tennessee Valley Authority, the people of
158 Florence believe that rates much lower than they are now paying for electricity can be obtained through municipal operation of the electric distribution system and the wholesale purchase of electricity by the municipality from the Tennessee Valley Authority.

Accordingly, the citizens of Florence, in an election which was held on June 30, 1933 to decide this question, expressed their desire to have the City of Florence acquire, by purchase or construction, and operate a municipal electric distribution system by a vote of 919 for and 63 against.

There are many people living in Florence who are unable to use electricity at the rates now being charged. The lower rates, which will be effected under municipal operation, will enable many to take electricity who are now unable to use it. The lower rates under municipal operation will encourage a larger use of electricity by all domestic consumers, thereby increasing the comfort and convenience of the homes.

* * * * * * * * *

Our economic and social wellbeing is, to a large degree, dependent upon the use and application of electricity. To lower the cost of electricity is to extend these benefits, and this is the desire of the people and the purpose of the City of Florence.

* * * * * * * * *

Financial Soundness of the Project: This project is not supported by taxation, but is supported by revenue derived from the sale of electricity. If it should develop that the resale rates proposed in Section V-e of this application do not yield sufficient revenue to meet expenses, then a revision of the rates upward to secure the necessary revenue will

159 be effected to insure the financial soundness of the project.

d. *Relation to General Plan:* The project is a portion of a long range program for the development and growth of a municipal distribution system, whereby the domestic, commercial and industrial consumers may be served at lower rates for electricity.

* * * * * * * *

h. *Objections:* It is known that the Alabama Power Company, which owns and operates the existing distribution system in Florence, together with several of their employees, are opposed to having the City of Florence engage in municipal distribution of electricity. Effort has been made to find a voter or taxpayer, or both, to file an objection, but without success.

i. *Competitive Character:* The franchise of the Alabama Power Company has expired. The City has refused to renew same, choosing to serve its own citizens as a governmental function. The project will, therefore, have no competition from other existing projects of the same character. It will compete with the existing gas company to some extent, for cooking and heating service, which may result in compelling a reduction of the present gas rates. The present gas rates in Florence are too high. The rates for gas are: For the first 500 cubic feet per month, $2.00; for the next 9,500 cubic feet, and for all over 10,000 cubic feet per month at $1.25 per 1,000 cubic feet. It should be of great benefit to the consumers of gas if the gas company is compelled to reduce rates.

* * * * * * * *

160 k. *Number of Men Employed:* It is estimated that an average of 90 persons will be employed directly on the work for a period of 7 months, and that employment will be given to about 200 persons for the same period for the manufacturing of equipment and materials.

* * * * * * * *

m. *Sequence:* The project, when completed, will be immediately put into operation. The city is assured of its power supply from the Tennessee Valley Authority. As previously mentioned in this application, the Alabama Power

Company, who are now operating without franchise, will, under the Alabama law, be required to remove the existing distribution equipment.

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r. *Unemployment in District Involved:* A table compiled from the report of the Relief Department of Lauderdale County, of which Florence is the County seat, covering the period from July, 1933 to October, 1933, inclusive, is presented below. This table shows the number of destitute families and unemployed persons in the County that are now receiving funds and food through this department and the funds expended.

Month	Number of Families	Number of Persons	Amount Expended	Administration
July	793	3,619	$6,629.61	$894.60
August	1,216	5.943	10,698.08	1,024.32
September	1,492	7,251	10,663.95	1,157.12
October	1,162	5,660	12,338.80	1,463.33
	Total		$40,330.44	$4,539.37
Grand Total				$44,869.81

The population of Lauderdale County is approximately 40,000. The population of Florence is approximately 16,000.

Approximately 50% of the unemployed for Lauderdale County reside in the City of Florence. 161

About 65% of the relief funds were expended in the City of Florence.

s. Incidence of Material Orders: The steel and most of the building materials will probably be produced in Alabama. The poles and much of the pole line hardware will probably be produced in Alabama. The transformers, switching equipment, line devices, and meters will probably be manufactured in Pennsylvania, New York, Massachusetts and Wisconsin. The wire will be of copper, probably produced either in Arizona or the northwestern states and manufactured probably in the eastern states.

• • • • • • • • •

e. *Schedule of Rates:* The following rate schedules were obtained from the Tennessee Valley Authority; they are the rate schedules under which the Tennessee Valley Authority proposes that the City of Florence shall purchase and resell electricity:''

* * * * * * * * *

(The application showed that the total outstanding funded debt of the City is $2,278,000.00, all of which, except $410,000 of waterworks bonds, are presently in default. The application states that the City of Florence has attained its legal debt limit but that the proposed obligations have been construed by the Supreme Court of Alabama as not constituting debts of the city.)

Whereupon plaintiffs offered the application of
162 the city of Hartselle, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $95,500, for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 14, and is set forth below as follows:

Application of Hartselle, Alabama

for

Loan and Grant of $95,500

To Construct an

Electrical Distribution System

I. *General:*

This application has been prepared and the date is presented in accordance with Circular No. 2 of the Federal Emergency Administration of Public Works. If additional data is needed it will be promptly furnished by the correspondent upon request.

II. *Summarized General Information:*

a. *Applicant:* City of Hartselle, Morgan County, Alabama.

b. *Correspondent:* J. P. Hodges, Mayor, Hartselle, Alabama.

c. *Attorney:* Tennis Tidwell, Decatur, Alabama.

d. *Consulting Engineer:* Lide & Adler, Woodward Building, Birmingham, Alabama.

e. *Population:*

1910—1374)
1920—2209) From U. S. Census Report
1930—2204)

III. *Loan Requested:*

a. *Amount:* $95,500

b. Security: Revenue Bonds, secured by a pledge of the net revenues of the electrical distribution system,
163 and, if required, by a first mortgage lien on the physical properties constructed with the proceeds of this loan.

c. *Maturities:* Serial Bonds—One (1) to Twenty (20) years.

d. *Application of Grant:* It is requested that the grant be applied against the earliest maturing interest and principal payments.

e. Schedule of Funds Required: Funds will be required approximately as follows:

$2000 on approval of loan, balance in approximately five (5) equal monthly installments, beginning two to three months after approval of the loan.

IV. *Projects:*

a. *General Description:*

The project under contemplation will consist of a complete and new electric light and power distribution system for a city of about 2500 population. It is proposed that the distribution system be energized from a transformer sub-station located near the center of the city, which sub-station will be furnished by the Tennessee Valley and supplied by them with energy from Muscle Shoals and Wheeler Dam.

The distribution system is intended to practically duplicate and supplant a public utility distribution system. The City has secured ten year contracts from practically all of

the consumers now in the city, which contracts read as follows:

"Contingent Power Contract"

"For and in consideration of One ($1.00) Dollar in hand paid by J. P. Hodges, Mayor of the City of Hartselle, Alabama, on behalf of said City, the receipt whereof is hereby acknowledged, and in further consideration of the opportunity to secure lower electric rates for myself, and of the benefits that will accrue to me as a citizen of or business man of said city by reason of the net revenue which should be earned by the City from the municipal operation of its own electrical distribution system, it is hereby agreed as follows:

1. That when, and if, the City of Hartselle, Ala. has electrical energy of the required voltage and phase available for sale at the premises of the undersigned, the City will supply, and the undersigned, so long as he is a purchaser of electrical energy in the territory served by the City's municipal distribution system, will purchase his entire requirements of electrical energy from the City for a period of ten (10) years beginning as soon as the service is available, but not later than January 1, 1935.

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2. It is further agreed that the rates for electricity to be charged by the City and to be paid by the consumer shall be those prescribed by the Tennessee Valley Authority, and that such rates shall be lower than the present public utility rates paid by the undersigned."

The estimates of cost and of earnings are based upon the signed customers. Some of these customers are at present disconnected. Inasmuch, however, as this loan is for a long period, these customers will be connected to the system when normal business resumes, and especially when cheap power is offered. It is proposed to construct a new system complete without removing the old system.

It is also proposed to construct a central distributing sub-station near the center of the city, which sub-station will be equipped with transformers furnished by the T. V. A.

* * * * * * * *

b. *Estimates of the Cost of the Project:*

* * * * * * * *

The consumption of the domestic and commercial consumers is predicated upon a return to normal business conditions and upon the normal stimulation of consumption by the low promotional rates to be put into effect by the T. V. A.

* * * * * * * *

Economic and Social values of the project:

c. The lower rates resulting from this project will stimulate the industrial and commercial development of the city, and with the use of household electrical appliances the drudgery of house-keeping will be greatly relieved, thus improving home life for the residents.

165 *Long Range Development:*

d. The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the regions within transmission distance of the Muscle Shoals power development.

e. The city has no regional planning board.

f. The city is an isolated town about 11 miled South of Decatur, Ala. and is a part of the T. V. A. project.

g. The project was endorsed by a majority of the popular vote in the recent municipal election.

h. The objections which have been raised against the project are believed to have been inspired by the existing utility.

i. The project will not be competitive since practically all of the consumers are signed up for a ten (10) year period.

j. No drawings are believed to be essential at this time, but if the Board desires them they can be prepared. The design of a modern distribution system is a matter of tremendous detail, highly standardized, which at this stage is believed to be unnecessary. Maps of the City of Hartselle can be supplied the Board if it so desires. Plans and specifications for the distribution system can be prepared in approximately 60-days from the date of the completion of details incident to the Government's financing of the project.

Work can begin within 15-days from the date of completion of the drawings. The project should be completed within 5-months. The field and office labor incident to the work will entail about 20% of the total cost, or about $19,000. At an average rate of 61½c per hour, the number of man hours required will be 31000. This will give employment to approximately 50-men for five months for field work alone.

V. *Revenues & Expenses:*

a. The project is a new system.

b. The estimated income is predicated upon the
166 assumption (a) of a return to normal business conditions during the period of the loan, (b) that the town will not grow in population during this period, and (c) that the low T. V. A. rates will stimulate customer consumption. These assumptions seem conservative.

* * * * * * * * *

Much of the present industrial load is seasonal, which will have the effect of increasing the KW demand and decreasing the load factor of the City's purchased power. The T. V. A. power demand rates to municipalities, however, provide for this contingency so that the annual weighted demand will not be greatly increased.

* * * * * * * * *

The annual weighted demand is estimated at about 612 KW. On the basis of 612 KW and 1,320,000 KWH per year, the cost of T. V. A. power would be $11,760 per year. (Whereupon followed a detailed earning statement of the proposed project.)

VI. *Financial Data:*

b. Inasmuch as this application involves a loan and a grant for a revenue producing project and the applicant's collateral will be revenue bonds, which are not a general obligation, it appears unnecessary (by reason of special instructions of October 14 issued by Col. H. M. Waite, Deputy Administrator to the State Advisory Board) to answer specifically all details under Section 6 of Circular #2.

g. So far as is known there are no outstanding obligations in default.

(Whereupon followed a legal memorandum prepared by the city attorney concerning the proposed project, its financing and operation)

(Whereupon followed a certified copy of the proceedings of the city council with regard to the municipal election concerning the municipal distribution system.)

Jan. 10, 1934

Mr. George J. Davis, Jr.
State Engineer.
Alabama Advisory Board,
Federal Emergency Adm. of P. W.
Montgomery, Alabama.

167 IN RE: Application of Hartselle, Ala. for loan for construction of electrical distribution system.

Dear Mr. Davis:—

This is in reply to your favor of December 29, 1933, requesting additional information in connection with the above application.

1. The project was approved by the electorate on October 10, 1933. (296 votes for—18 votes against).

II. The anticipated profits and proposed payments on debt service thruout the 20-yr. proposed term of the loan are estimated as follows:

The application, page 6, indicates a net operating income available for interest and amortization of $10,230. This was based on a reasonable assumption that under the low T. V. A. promotional rates and on improved economic conditions the average gross income over a 20-yr. period would be $30,050. For the purpose of making the tabulation below we have used the earning statement as shown on page 6 of the application, for all except the first year of operation.

For the first year of operation, a large part of which will be in the Year 1935, at which time it is reasonable to expect greatly improved economic conditions, the net operating income is estimated to be $4,820, calculated as follows:

(Thereupon followed a detailed income statement.)

* * * * * * *

On the basis of 550 KW and 857,000 KWH per year, the cost of T. V. A. power would be $9,870.

(Thereupon followed a detailed earning statement, and a tabulated estimate of the net income available for each of the twenty years for the annual interest charges and principal maturities of the Serial Bonds)

The above tabulation is predicated upon a grant of 30% of the cost of labor and material, which will enable the municipality to make effective immediately the low rates, in cooperation with the Tennessee Valley Authority's program. This grant, as shown above, will carry the project thru its development period. If the grant is absorbed as shown above, there will be a fair margin of safety even under the conservative estimate of net income.

. . . . . .

III.

(a) The assessed valuation of taxable property for the last three fiscal years was as follows:

1930—$1,546,694
1931— 1,422,596
1932— 1,191,240

(b) There are no defaults on either principal or interest payments.

(c) The tax rate is:

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State & County — 17 mils.
School — 4 "
City — 5 "
Based on 60% valuation.

(d) Amount of taxes levied and collected are as follows:

Year	Levied	Uncollected
1930	$7,733.46	$73.43
1931	7,112.98	431.31
1932	6,956.20	189.11

IV. Copies of the Alabama Power Company's franchise are hereto attached.

V. We estimate that about 10% of the customers signed up to take power from the municipal plant are at present

not taking service from the existing system. This is due largely to the general economic conditions and the high rates.

VI. The sub-station cost, as shown on page 3 of the application, is itemized as follows:

(Thereupon followed a detailed statement of the cost of the sub-station)

This letter is being sent in quadruplicate, as requested.

If there is any further additional information desired we will be glad to supply same upon request.

Yours very truly,
LIDE & ADLER
By— Julian E. Adler"

JEA/T

169 Whereupon plaintiffs offered the revised application of the city of Tuscumbia, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $127,244 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the revised application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs' Exhibit No. 15. The following statements, among others, are contained in Plaintiffs Exhibit No. 15:

"*Revised Application to Federal Emergency Administration of Public Works for Loan for the Construction of an Electrical Distribution System for the City of Tuscumbia, Alabama*

The original application for this loan was filed with the Alabama Advisory Board of Public Works, in Montgomery, Alabama, on August 30th, 1933. No action has yet been taken by that Board except as indicated by their letter of September 29th, 1933; a copy of said letter as well as the reply thereto is herewith attached.

The original application is revised in the following respect.

1. In cooperating with the Tennessee Valley Authority to immediately build up greater consumption of electrical

energy, especially for domestic use, the original investment in transformers, meters and secondary wiring has been increased. In the original plan it was contemplated that the investment in these items would take place over a period of years and be paid for out of operating profits.

2. A revised tabulation of income and expenses
170 has been prepared based on consumption for the year 1932 (the latest figures available) and at rates suggested by the Tennessee Valley Authority.

3. Estimates of cost have been revised to take care of the $1.00 per hour wage for skilled labor; the order establishing this rate was made after August 30th, 1933.

THE CITY OF TUSCUMBIA,
ALABAMA.
By Authority of the Board of Mayor & Alderman
LIDE & ADLER, ENGINEERS.
By JULIAN E. ALDER

III. *The Loan Requested*

• • • • • • • • • •

(d) It is preferred that the grant be applied against principal and interest payments to the extinguishment of the serial bonds maturing earliest together with the interest during such period to the extent that the grant will permit. This is particularly desired in order that the City may cooperate with the Tennessee Valley Authority and immediately promulgate very low rates, particularly for domestic consumption. Under this procedure the operating income will be adversely affected until consumer consumption is increased. Experience has demonstrated the fact that when promotional rates are promulgated the consumption will increase to such an extent that the revenues will ultimately equal those received prior to the reduction in rates.

• • • • • • • • • •

171 IV. *The Project*

• • • • • • • • • •

This is the more modern system and will better serve the higher load density which will result from the low T. V. A. rates.

(Thereupon followed a detailed tabulated estimate of the cost of the Project.)

Revenues and Expenses

* * * * * * * * *

The average annual consumption per residential consumer in the above tabulation is 825 kw hours, with an average rate of 4.72¢. In Tacoma, with an average rate of 1.87¢ the consumption averages 1,500 kw hours. The following tabulation of annual income assumes that the consumption per customer will not increase even though rates are materially reduced. It is based on an application of the rates proposed by the TVA to the actual consumption of each residential customer for the month of April 1932. It also assumes a reduction of 33 1/3% in rates to commercial consumers, and 25% reduction in industrial rates. The consumption and income from street lighting is assumed to remain unchanged.

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Copy of Letter From Lide & Alder, Engineers, to the State Engineer of the Public Works Board at Montgomery, in Reply to His Letter of Sept. 29, 1933.

Birmingham, Ala., Sept. 30, 1933.

Mr. George J. Davis, Jr.
State Engineer, P.W.A.
Montgomery, Ala.,

172 Re: City of Tuscumbia Electric Distributing System.

Dear Sir:—

This letter is in response to your favor of the 29th inst. which seeks further information concerning application of the above submitted on August 30th, 1933. Answers follow:—

1. At the time of filing the application there was no ruling to cover a wage scale of $1.00 per hour for skilled labor, but only that of the 40¢ per hour for unskilled. To comply

with the present ruling the following changes should be made with respect to the application—Section IV, page 7.

Estimated Costs	*Material*	*Labor*	*Total*	*Man Hours*
Grand Total	$77,565	$16,963	$94,528	28,273
Labor increase due to hindrance add 33 1/3% to distribution labor		4,800	4,800	8,000
Contractor's fees—10% of $94,528		9,453	9,453	2,500
	$77,565	31,216	108,771	38,773
Engineer's fees—5%			5,439	1,000
			114,210	39,773
Interest during construction			1,140	
Total of Loan			$115,350	

6 The salvage value of the distribution system to the utility itself—exclusive of real estate—is probably about $35,000 to $40,000.

Yours very truly,

LIDE & ADLER
(Signed) MARTIN J. LIDE

173 Whereupon plaintiffs offered the revised application of the City of Sheffield, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $228,317.12 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original revised application, furnished to the plaintiffs by the defendants, and was received in evidence as Plaintiffs Exhibit No. 16. This application is substantially the same in form and type of information given as the application of Tuscumbia set forth herein as Plaintiffs Exhibit 15. The following statements, among others, are contained in Plaintiffs Exhibit 16:

"*Revised Application to Federal Emergency Administration of Public Works for Loan for the Construction of an Electrical Distribution System for the City of Sheffield, Alabama*

The original application for this loan was filed with the Alabama Advisory Board of Public Works, in Montgom-

ery, Alabama, on August 30th, 1933. No action has yet been taken by that board except as indicated by their letter of September 29th, 1933; a copy of said letter as well as the reply thereto is herewith attached.

The original application is revised in the following respect.

1. In cooperating with the Tennessee Valley Authority to immediately build up greater consumption of electrical energy, especially for domestic use, the original investment in transformers, meters and secondary wiring has been increased. In the original plan it was contemplated that the investment in these items would take place over a period of years and be paid for out of operating profits.

2. A revised tabulation of income and expenses has been prepared based on consumption for the year 1932
174 (the latest figures available) and at the rates suggested by the Tennessee Valley Authority.

3. Estimates of cost have been revised to take care of the $1.00 per hour wage for skilled labor; the order establishing this rate was made after August 30th, 1933.

THE CITY OF SHEFFIELD,
ALABAMA
By Authority of the City Commission,

LIDE & ADLER, ENGINEERS,
By MARTIN J. LIDE.

* * * * * * * * * *

It is preferred that the grant be applied against principal and interest payments to the extinguishment of the serial bonds maturing earliest together with the interest during such period to the extent that the grant will permit. This is particularly desired in order that the City may cooperate with the Tennessee Valley Authority and immediately promulgate very low rates, particularly for domestic consumption. Under this procedure the operating income will be adversely affected until consumer consumption is increased. Experience had demonstrated the fact that when promotional rates are promulgated the consumption

will increase to such an extent that the revenues will ultimately equal those received prior to the reduction of rates.

* * * * * * * * * *

This is the more modern system and will better serve the higher load density which will result from the low T. V. A. rates.

* * * * * * * * * *

The following tabulation of annual income assumes that the consumption per customer will not increase even though rates are materially lowered. It is based on an applicataion of the rates proposed by the TVA to the actual consumption of each residential consumer for the month
175 of April 1932. It is also based on a reduction from existing commercial rates of 33 1/3%, and from industrial rates of 25%. The consumption and income from street lighting is assumed to be unchanged.

* * * * * * * * * *

Copy of Letter From Lide & Adler, Engineers

Birmingham, Ala., Sept. 30, 1933.

Mr. George J. Davis, Jr.
State Engineer, P. W. A.
Montgomery, Ala.,

Re: City of Sheffield Electric Distributing System

Dear Sir:—

This letter is in response to your favor of the 29th inst. which seeks further information concerning application of the above submitted on August 30th, 1933. Answers follow:—

1. At the time of filing the application there had been no ruling to cover the wage for skilled labor of $1.00 per hour, but only that to provide a minimum of 40¢ per hour for labor. To comply with the present rule the following changes should be made with respect to our application—Section IV, page 7. Estimated Costs.

	Material	*Labor*	*Total*	*Man Hours*
Grand Total	$142,030.39	$29,500	$171,530.59	49,209
Labor increase due to hindrance—add 33 1/3% to distribution labor		6,600	6,600	11,000
Contractor's fees—10% of $171,530		17,153	17,153	4,000
			$195,283	64,209
Engineer's fees—5% of $195,283			9,764	1,500
Interest during construction period 5 months—4% of $205,000 x 1/2			1,720	
Total of Loan			$206,767	65,709

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* * * * * * * * * *

6. The salvage value of the distribution system to the utility itself (exclusive of real estate) is probably about $70,000.

* * * * * * * * * *

Yours very truly,

LIDE & ADLER
(Signed) MARTIN J. LIDE."

177 Whereupon plaintiffs stated that the defendants had agreed to furnish them with photostatic copies of the original applications of Sheffield and Tuscumbia and wished to reserve exhibit numbers for these two applications. Plaintiffs Exhibits Nos. 17 and 18 were reserved for these two original applications. At a later time during the hearings plaintiffs offered the original application of the City of Sheffield, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $200,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received as Plaintiffs Exhibit No. 17. This application is substantially the same in form and type of information given as the application of Hartselle set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiff's Exhibit 17:

"(d) Martin J. Lide and Julian E. Adler, 903 Woodward Building, Birmingham, Ala.. Consulting Engineers.

* * * * * * * * * *

IV. *The Project*

(a) The project under contemplation consists of a complete municipal electric light and power distribution system for a city of about 6,000 population, and a transmission line to connect it with a source of power from the Government Reservation at Muscle Shoals, Alabama. The distribution system is intended to practically duplicate and to supplant a public utility distribution system whose franchise has expired, which is in a state of depreciation due both to obsolescence and wear, and which, moreover, under the laws of Alabama can be declared to be a nuisance and ordered by the City to be removed from the streets.

It is intended to construct the new system com-
178 plete before removing the old.

* * * * * * * * * * *

The City of Sheffield adjoins the Government Reservation at Muscle Shoals. The Tennessee Valley Authority will construct a double circuit 11,000 volt, three phase, four wire transmission line a mile long to the boundary line, from which place it will be extended by the City to its main distribution sub-station, and to a consumer sub-station (The King Foundry Co.)

* * * * * * * * * * *

IV. *Economic and Social Value of the Project*

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Long Range Development

(d) The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the Tennessee Valley largely through the instrumentality of cheap power.

* * * * * * * * * * *

According to Mr. Llewellen Evans, Consulting Engineer for the Tennessee Valley Authority, the consumption per residential consumer in Tacoma is 1,800 kw hours per year, at an average rate of 1.87¢ per kw. hour. If for conservatism we decrease this consumption to 1,500 kw hours, assume an average rate of 2.2¢, with 1,200 customers the income from residential service would be approximately $40,000."

* * * * * * * * * * *

(The application shows that a large amount of the outstanding bonds of the city are in default.)

179 Whereupon the plaintiffs introduced the original application of the City of Tuscumbia, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $110,000 for the purpose of financing the construction of a municipal electric distributing system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit 18. This application is substantially the same in form and type of information given as the application of Hartselle, set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiff's Exhibit 18:

"IV. *The Project*

(a) The project under contemplation consists of a complete municipal electric light and power distribution system for a town of about 4,500 population, and a short transmission line to connect it with a power source at Sheffield supplied from the Muscle Shoals Government Reservation adjoining Sheffield.

* * * * * * * * * *

The distribution system is intended to practically duplicate and supplant a public utility distribution system whose franchise has expired, which is in a state of partial depreciation due to both obsolescence and wear, and which, moreover, under the laws of Alabama can be declared a nuisance and ordered by the City to be removed from the streets. It is intended to construct the new system complete before removing the old.

* * * * * * * * * *

The Tennessee Valley Authority will construct a double circuit 11,000 volt 3 phase, 4 wire transmission line a mile long to the boundary line, from whence it will be extended

180 by *tye* City of Sheffield to the King Iron Foundry Co. Substation (as indicated on the map) and from there on by the City of Tuscumbia to its own substation."

* * * * * * * * * *

6. The salvage value of the distribution system to the utility itself—exclusive of real estate—is probably about $35,000 to $40,000.

• • • • • • • • • • •

IV. *The Project*

• • • • • • • • • • •

(d) *Long Range Development*

The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the Tennessee Valley largely through the instrumentality of cheap power.

• • • • • • • • • • •

V. *Revenues and Expenses*

• • • • • • • • • • •

According to Mr. Llewellen Evans, Consulting Engineer for the Tennessee Valley Authority, the consumption per residential consumer in Tacoma due to a low rate schedule proposed for the Tennessee Valley is 1,800 kw hours per year at an average rate of 1.87¢ per kw. hour. If for conservatism we should decrease this to 1,500 kw hours at an average rate per residential consumer of 2.2¢, with 800 residential consumers, the income from the residential consumers would be approximately $26,667.

• • • • • • • • • • •

Under the Tennessee Valley Authority proposed rates for wholesale power, the cost of power would be as follows:—

• • • • • • • • • • •

Tennessee Valley Authority
Wilson Dam
Florence, Ala.

181 August 31st, 1933.

Mr. W. L. Farr, Mayor,
Tuscumbia, Alabama.

Dear Sir:—

Martin J. Lide and Julian E. Adler, Consulting Engineers, Birmingham, Alabama, have asked that we furnish information on two points for use in presenting your application to the Federal Emergency Public Works Administra-

tion for funds to provide the City of Tuscumbia with distribution facilities for electricity.

Item 1. As to the rates that the Tennessee Valley Authority would charge the City of Tuscumbia.

In this connection, no rates or rules have yet been adopted by the Authority, but the rates now being considered are similar in form to those used by your Engineers, and are somewhat lower.

Item 2. Will Tennessee Valley Authority control the resale price to be established by the City of Tuscumbia.

This question is answered by the provisions of Section 12 in the Tennessee Valley Act, H. R. 5081, which reads as follows:

"Provided further, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contracts shall be voidable at the election of the board if a discriminatory rates, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: And provided further, That as to any surplus power not so sold as
182 above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just and fair.

Yours very truly,

TENNESSEE VALLEY AUTHORITY
(Signed) Llewellyn Evans,
Consulting Engineer."

• • • • • • • • • • •

The application shows that the annual disbursements of the city for the years 1927, 1928, 1929, and for the years 1931, and 1932, were in excess of its annual receipts.

183 Whereupon the plaintiffs introduced the application of the City of Russellville, Alabama, to the Federal Emergency Administration of Public Works for a loan and grant of $148,000 for the purpose of financing the construction of a municipal electric distribution system. The application was a photostatic copy of the original application furnished to plaintiffs by the defendants and was received in evidence as Plaintiffs Exhibit No. 23. This application is substantially the same in form and type of information given as the application of Hartselle, set forth herein as Plaintiffs Exhibit 14. The following statements, among others, are contained in Plaintiffs Exhibit No. 23:

"Consulting Engineer: Lide & Adler, Woodward Building, Birmingham, Alabama.

* * * * * * * * * * *

IV. *Project:*

a. *General Description:*

* * * * * * * * * * *

It is proposed that the distribution system be energized from a transformer sub-station located near the center of the city, which sub-station will be furnished by the Tennessee Valley Authority and supplied by them with energy from Muscle Shoals and Wheeler Dam.

The distribution system is intended to practically duplicate and supplant a public utility distribution system. The City has secured ten year contracts from practically all of the consumers now in the city, which contracts read as follows:

(There is included at this point the same contingent power contract as set forth in Exhibit 14 herein.)

The estimates of cost and of earnings are based upon the signed customers. Some of these customers are at present disconnected. Inasmuch, however, as this loan is for a long period, these customers will be connected to the sys-

184 tem when normal business resumes, and especially when cheap power is offered. It is proposed to construct a new system complete without removing the old system.

It is also proposed to construct a central distributing sub-station near the center of the city, which sub-station will be equipped with high tension transformers furnished by the T. V. A.

* * * * * * * * * *

b. *Estimates of the Cost of the Project:*

* * * * * * * * * *

The consumption of the domestic and commercial consumers is predicated upon the return to normal business conditions and upon a normal stimulation of consumption by the low promotional rates to be put into effect by the T. V. A.

* * * * * * * * * *

Economic and Social Value of the project;

c. The lower rates resulting from this project will stimulate the industrial and commercial development of the city, and with the use of household electrical appliances the drudgery of housekeeping will be greatly relieved thus improving home life for the residents.

Long Range Development:

d. The project is a part of the program of the Tennessee Valley Authority of establishing better living and social conditions in the regions within transmission distance of the Muscle Shoals power development.

e. The city has no regional planning board.

f. The city is an isolated town about 22-miles from the Tennessee River, and is a part of the T. V. A. project.

g. The project was endorsed by a majority of the popular vote in the recent municipal election. (405 in favor; 103 against—on December 11, 1933).

h. The objections which have been raised against
185 the project are believed to have been inspired by the existing utility.

i. The project will not be competitive within the city limits since practically all of the domestic and commercial consumers are signed up for ten years, and most of the industrial consumers. It is expected to sign up sufficient additional industrial load to insure the predicted income in normal years.

* * * * * * * *

The field and office labor incident to the work will entail about 20% of the total cost, or about $30,000.

• • • • • • • •

V. *Revenues & Expenses:*

• • • • • • • •

b. The estimated income is predicated upon the assumption (a) of a returns to normal business conditions during the period of the loan, (b) that the town will not grow in population during this period, and (c) that the low T. V. A. rates will stimulate customer consumption. These assumptions seem conservative.

It is regretted that the classified customer consumption and income for the past three years cannot be made available for the examiners, but this information was refused the City by the existing utility. This refusal is deemed arbitrary and illegal since under Alabama law the utility is required to pay the City a license of 2% of its gross revenue and the customer income data is of importance in checking the local utility income. The data could probably be secured by legal means, but it might require a year to secure it and it would therefore be too late to be of service."

• • • • • • • •

Whereupon **Lee Glenn** was called as a witness for
186 and on behalf of the plaintiffs and, having been duly sworn, was examined and testified as follows:

Direct examination

My name is Lee Glenn and I am mayor of the city of Florence, Alabama. I have been mayor of Florence Since April, 1931. Alabama Power Company is at the present time furnishing electric service to the city of Florence and its residents. The company's former franchise expired in March, 1933, at which time the city of Florence granted the company an additional six months franchise. Since the expiration of the six-months franchise, no formal franchise has been granted to the Alabama Power Company. Alabama Power Company is at present operating in the city with sufferance on the part of the city. Alabama Power Company has paid the occupation tax or license to the city of Florence since the expiration of this franchise up to the

first day of 1936, at which time we refused the license. The company has paid their license to do business, that is, the privilege license, every year since the franchise has expired up to January, 1936, at which time it was tendered but refused. So far as the city is concerned, there is no franchise tax on the power company. There is no other person, firm or corporation that is situated to furnish light and power to the city of Florence at the present time. We feel that there might be a legal technicality arise whereby, if we granted the company a privilege license to do business, the company might, in the event that we were able either to purchase, build or buy our own distribution system, contend that the license for a year would con-
187 stitute a right to do business for a year, and, therefore we preferred not to issue them any license at all. It is our purpose, if we acquire a distribution system for the city, to terminate the right of the Alabama Power Company to engage in the electric utility business in the city. We have not as yet given notice to the Alabama Power Company to vacate the streets and other public places within the city, but we propose to do so if we acquire a system of our own that will take care of the needs of the city. Our city has filed an application with the Public Works Administration for a loan and grant of money to build a municipal electric distribution system and an allotment of the amount asked for has been made by the Public Works Administration. That money is now available but for this suit.

The population of the city according to the 1930 census was nearly 13,000 and at present is nearly 16,000. The total assessed valuation of the taxable physical property within the city based upon 60 percent valuation for taxes for 1933 was $5,563,986; for 1934, $5,372,165; for 1935, $5,374,480. The total bonded indebtedness of the city is $2,824,600. Of this amount there are $597,000 of refunding bonds; $430,000 of school bonds; $685,000 of water works bonds; $1,066,000 of public improvement bonds, and $46,600 of floating debt. All the bonds are in default, both as to principal and interest, except $390,000 of first mortgage water works bonds. If the city builds an electric distribution system it will have two or three possible sources of supply of power. We filed an original application for a

Public Works Administration loan with the intention of buying Tennessee Valley Authority Power. We later were enjoined from that in the Ashwander case in Birmingham which went to the Supreme Court, and, in order to get around the injunction, we changed it whereby we might
build a steam plant if necessary, or, if possible, buy
188 from the Alabama Power Company; or, if the question was ever determined that the Government had the right to sell power at Wilson Dam, to buy from that source. Since it has been determined that the Tennessee Valley Authority has the right to sell power from Wilson Dam, we have not made a contract with Tennessee Valley Authority to supply us with power for this municipal system. I would feel very badly if the Tennessee Valley Authority would not supply us with power, but I have no contract with them. They have proposed to serve us with power at a certain rate. I would seek to renew the type of contract we had before wherein that rate was set out. Tennessee Valley Authority prescribes the rates at which the city shall resell the power:

"Q. Mr. Glenn, I hand you some certified copies of the minutes of the Commission of the City of Florence, containing a document headed 'Power Contract between Tennessee Valley Authority and the City of Florence, Alabama.' I will ask you to examine that and state if that is correct. A. Yes, sir, that is correct.

"Q. That is a correct copy of the contract between the Tennessee Valley Authority and the City of Florence, which you say has been cancelled? "A Yes, sir.

"Mr. Turner. If the Court please, we offer that contract with the minutes.

"The Court. That raises the same question.

"Mr. Scott. The same question, your Honor, because this witness has clearly testified that no contract exists.

"The Court. That is along the lines that you have already outlined, showing--

"Mr. Turner. Showing the common purpose, in connection with Tennessee Valley Authority, Public Works
189 Administration, and Rural Electrification Administration.

"The Court. Showing that negotiations were going on, and why they were stopped.

"Mr. Turner. Yes.
"The Court. I will receive it.
"Mr. Scott. Exception."

Whereupon the identified copy of the power contract between Tennessee Valley Authority and the city of Florence, Alabama, was received in evidence as Plaintiffs' Exhibit No. 19. This contract reads as follows:

190

Power Contract Between
Tennessee Valley Authority
and
City of Florence, Alabama

THIS AGREEMENT, made and entered into this day of 1934, pursuant to the Tennessee Valley Authority Act of 1933, between the Tennessee Valley Authority, hereinafter called "AUTHORITY", a corporation created by and acting under said act, and the City of Florence, a municipal corporation duly organized, created and existing under and by virtue of the laws of the State of Alabama, hereinafter called "CONTRACTOR",

WHEREAS AUTHORITY, by Section 1 of said Act, is authorized to sell the surplus power generated by it and not used in its operation, and is directed to give preference to States, Counties, Municipalities and cooperative organizations of citizens or farmers not organized or doing business for profit; and

WHEREAS, by Section 11 of said Act it is provided that the sale of power, by AUTHORITY shall be primarily for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available; and

WHEREAS, the electors of the CONTRACTOR have by referendum authorized CONTRACTOR to acquire by construction or purchase a municipal electric distribution system, and CONTRACTOR intends, with all possible diligence and expedition, to acquire by construction or purchase and to operate such a system; and

WHEREAS, CONTRACTOR desires to purchase power from AUTHORITY for municipal purposes and for resale and proposes to make the necessary appropriations in payment therefor; and

WHEREAS, CONTRACTOR has by ordinance of its council duly authorized the making of this contract, and AUTHORITY, by its by-laws and resolutions, has likewise so authorized;

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. *Term of Contract:* This contract shall become
191 effective upon the execution hereof, and shall continue in effect for thirty years; *Provided, however,* that all obligations of the parties hereto with regard to the rendition of service and payment therefor shall begin at such times (hereinafter designated "date of initial delivery") as CONTRACTOR shall have acquired its distribution system, or any part thereof, and shall be in physical position to take such service for its said system or part thereof. All service and payment periods hereinafter referred to shall be computed (as) from the date of initial delivery.

2. *Acquisition of Plant.* CONTRACTOR agrees to use all reasonable diligence in acquiring by construction or purchase a municipal distribution system for the City of Florence with the utmost expedition, and to do all acts and things which it may legally do, which may be necessary or helpful in effectuating such acquisition. AUTHORITY agrees, upon request of CONTRACTOR, to render to CONTRACTOR without compensation such accounting, legal and engineering assistance looking to the acquisition of said system as AUTHORITY may deem helpful or advisable.

3. *Power Supply.* AUTHORITY will, from the date of initial delivery to the expiration hereof, supply electrical energy to CONTRACTOR for municipal purposes and for re-sale. CONTRACTOR agrees to purchase from AUTHORITY, and AUTHORITY agrees to supply, the entire power requirements of CONTRACTOR. Said energy will be delivered in the form of three phase, alternating current at approximately 60 cycles per second and approximately 4,000 volts, or at such voltage as the parties may from time to time agree. The maximum amount of electricity (called "reserve power") which AUTHORITY agrees to supply within the first two year period is 7,500 KW, but there-

after CONTRACTOR shall have the right to increase such maximum demand as herein specified, and AUTHORITY shall deliver the same to CONTRACTOR. After two years from the date of initial delivery, as CONTRACTOR
192 foresees the necessity for more than 7,500 KW, CONTRACTOR shall make written demand upon AUTHORITY for an increase of reserve power. Such increase shall take effect nine months after date of demand if the amount demanded be less than 5,000 KW, twelve months after date of demand if the amount demanded be over 5,000 KW, and not over 10,000 KW, and two years after date of demand if the amount demanded be in excess of 10,000 KW.

4. *Conditions of Use and Service.* (a) Point of Delivery: The energy to be supplied CONTRACTOR hereunder shall be delivered at the outgoing side of main switch or switches on the low tension side of the main step down transformers of the substation to be owned and operated by the AUTHORITY, and to be located on Lot 170 in the City of Florence, Lauderdale County, Alabama, said Lot fronting on Sweetwater and Chestnut Streets in said City, or at such other point as AUTHORITY may select which will not occasion greater costs to CONTRACTOR.

(b) *Grant of Franchise to AUTHORITY:* CONTRACTOR agrees to grant AUTHORITY a franchise, extending to the date of termination of this contract, in a form acceptable to AUTHORITY, for the use of the streets and alleys of CONTRACTOR for the construction of poles and lines serving CONTRACTOR'S substation or substations and/or areas outside the corporate limits of CONTRACTOR.

(c) *Joint Use of Poles:* AUTHORITY agrees to permit CONTRACTOR, subject to such reasonable conditions as AUTHORITY may prescribe in the interest of safety and the prevention of electrical interference, to permit CONTRACTOR to use AUTHORITY'S poles within CONTRACTOR'S corporate limits, within the term of this contract, for local distribution wires.

(d) *Use of Substation Facilities:* AUTHORITY agrees, during the term of this contract. to permit CONTRACTOR the exclusive use of the 2300 volt portion of the Florence Central Substation, beginning at the load side of AU-

THORITY'S metering apparatus, located on Lot
193 170 in the City of Florence, together with all equipment and appurtenances. CONTRACTOR undertakes, at its own expense, to operate, maintain and repair, and to extend or alter as the situation may require, such substation facilities as are granted for the use of CONTRACTOR, and to save AUTHORITY harmless with respect thereto. CONTRACTOR shall be responsible for any damage to such facilities from any cause whatsoever. CONTRACTOR agrees to pay AUTHORITY for such use the sum of Twelve Thousand ($12,000.) Dollars, at the rate of Two Hundred ($200) Dollars monthly beginning two years after the date of initial delivery. All facilities which CONTRACTOR may install shall be considered personalty and at the expiration of this contract, CONTRACTOR may remove all facilities which it has purchased and installed without expense to AUTHORITY. AUTHORITY will from time to time as it contemplates a change in the physical characteristics of the supply system, notify CONTRACTOR of the resulting short-circuit characteristics, so that CONTRACTOR MAY GOVERN its use of the aforesaid equipment accordingly. It is understood and agreed that AUTHORITY has an option to purchase said Florence Central Substation, and that the covenants of this sub-article are conditioned on the exercise of such option.

5. *Schedule of Rates:* Attached hereto, and hereby made a part hereof by reference, the same as though physically incorporated herein, is a "Schedule of Rates and Charges." CONTRACTOR agrees to pay for the energy supplied by AUTHORITY at the rates fixed in Schedule A, entitled "Tennessee Valley Authority Wholesale Power Rates."

6. *Resale Rates:* In order to carry out the obligations of AUTHORITY with respect to the promotion of a wider use of electricity throughout the area in which it operates, CONTRACTOR agrees to charge all of its consumers the rates prescribed for the several classes of consumers in Schedule B, entitled "Tennessee Valley Authority
194 Resale Rates," and not to depart therefrom except with the written consent of AUTHORITY. AUTHORITY may from time to time prescribe additional resale schedules for special classes of customers or special uses of electricity, and CONTRACTOR agrees to be bound

thereby. If it should appear that the rates provided for in said Schedule with the surcharges provided for therein do not under economical and efficient management by CONTRACTOR produce revenues sufficient to maintain the system on a self-supporting and financially sound basis, then upon application by CONTRACTOR, AUTHORITY shall consent to such changes in rates as will provide for such increased revenues as will place the system upon a self-supporting and financially sound basis when operated under economical and efficient management.

7. *Rules and Regulations of AUTHORITY:* Attached hereto, and hereby made a part hereof by reference, the same as though physically incorporated herein, is a schedule entitled "Schedule of Rules and Regulations", and it is understood that the several provisions of said schedule, as well as the several provisions of this contract and of the Schedule of Rates and Charges, are of the essence of this contract, and that their violation by CONTRACTOR render this contract voidable at the option of AUTHORITY, unless such violations are cured upon reasonable notice.

The Schedule of Rules and Regulations is standard and of uniform applicability to all municipal customers of AUTHORITY, and the CONTRACTOR hereby agrees to be bound during the term hereof, by any future additions or amendments of such Schedule of Rules and Regulations prescribed after conference with representatives of CONTRACTOR, the same as though such additions or amendments were incorporated herein. If there should be any conflict between any Rules or Regulations prescribed pursuant to this and the following article, and the terms of this contract, the contract shall control.

195 8. *Rules and Regulations of CONTRACTOR.* In the interest of uniformity, and for the protection of both CONTRACTOR and AUTHORITY, CONTRACTOR agrees to adopt and enforce such rules and regulations for the sale of electricity to the public as AUTHORITY may, after conference with representatives of CONTRACTOR, from time to time prescribe during the term of this contract for uniform application to all of the municipal customers of AUTHORITY, deemed to have similar characteristics.

9. *Declaration of Policy.* This contract is entered into in a spirit of cooperation and with the desire on the part of AUTHORITY and CONTRACTOR so to administer the relationship established by this contract as to operate to the benefit of CONTRACTOR and its residents and of the residents of the Tennessee Valley. In furtherance of this cooperative relationship AUTHORITY will, by every means within its power, seek to further the economic welfare of CONTRACTOR by fostering and promoting the increased use of electricity within CONTRACTOR'S corporate limits, and by such other means as are provided by law. CONTRACTOR agrees to cooperate with AUTHORITY in such program within CONTRACTOR'S area of operation and to work with AUTHORITY in furthering the economic well-being of the entire Tennessee Valley. This contract shall be construed and administered in accordance with this statement of policy.

10. *Contract Not Transferable:* Neither this contract nor any interest therein shall be transferable or assignable by CONTRACTOR to any other party without the consent of AUTHORITY, other than by involuntary transfer or assignment pursuant to proceedings, brought by a governmental agency to enforce the payment of satisfaction of an indebtedness arising out of money borrowed by CONTRACTOR to finance the purchase or construction of its electric distribution plant and/or equipment.

IN WITNESS WHEREOF, the parties hereto
196 have caused this instrument to be signed and attested by their duly authorized officers, the day and year first above written.

ATTEST: TENNESSEE VALLEY AUTHORITY

..... By .....

Secretary *Chairman, Board of Directors.*

197 We had some negotiation with Alabama Power Company with respect to the purchase of its distribution system within the city. I filed the city's application with Public Works Administration, four days after negotiations with the Power Company were concluded. We have since had, and are now having, some negotiation with

the company with respect to the purchase of the property. After the allotment had been made to Florence by the Public Works Administration for this loan and grant to build the system, it was held up by Administrator Ickes for
reasons set forth in a telegram sent me, as mayor
198 of the city, by Administrator Ickes on July 11, 1934,
which telegram reads as follows:

"Wash., D. C., July 11, 1934

"Honorable Lee Glenn

"Mayor of Florence, Alabama.

"Lilienthal TVA has explained proposal to the communities north of Alabama whereby Authority will purchase distribution systems facilities Florence and other communities from Alabama Power Company rehabilitate them and turn them back to communities. Your proposal to amend your application such that Florence purchases existing facilities and uses PWA funds for rehabilitation and extensions. Lilienthal informs me all other communities in area affected have approved TVA plan that Florence alone is holding out. Policy Public Works is to support Tennessee Valley Authority. Its proposal further regional operation rural electrification pursuant to President's desires. Administration will advance no funds to Florence for expenditures inconsistent TVA plan. It will aid entire region and in our judgment is highly advantageous to you. However allotment and grant will be maintained pending completion transaction between TVA and Alabama Power Company. Suggest you promptly take appropriate action accept Tennessee Valley Authority proposal so that it may exercise its option within option period."

"(signed) ICKES, *Administrator.*"

Just subsequent to July 11, 1934, I received a telegram from Mr. David E. Lilienthal, with respect to the same matter. This telegram was addressed to me as mayor of the city. This telegram reads as follows:

"Hon. Lee Glenn and Commissioners Harlan and Redd

"City of Florence, Alabama.

"Tennessee Valley Authority considers your alter-
199 nate proposal inconsistent with major sections of
plan outlined to you on July 3. Pursuant to my

understanding with you alternate proposal was submitted this morning to Administrator Ickes who has advised you directly. Indications are formal resolutions from Alabama municipalities requesting Authority to exercise options will be in hand by next Monday at which time Authority plans exercise option. Appreciate your advising us by that time whether Florence desires Authority to include or exclude Florence distribution systems in option for purchase.

"(signed) DAVID E. LILENTHAL."

The proposal referred to in the telegram of Mr. Ickes was the purchase by Tennessee Valley Authority of the Florence distribution system from Alabama Power Company under an option the Tennessee Valley Authority had at that time, and, the resale of the distribution system to the city under certain conditions imposed by Tennessee Valley Authority. I objected to the city's purchase of the distribution system from Tennessee Valley Authority under the conditions proposed by it. And, I take the telegram from Mr. Ickes to be in response to an alternative proposal that I made to Mr. Ickes through Mr. Lilienthal. The alternative proposal that I made, and the background of it, was as follows: The Tennessee Valley Authority desired to purchase all the municipal distribution systems in its area rather than have competing systems, or, rather than build new systems. Because of this, they contracted with the Alabama Power Company whereby they obtained this option to purchase the company's municipal distribution systems in some 14 cities within the area to be served by Tennessee Valley Authority. One of these systems was the one located in the city of Florence. The city of Florence is located right at Wilson Dam. The Alabama Power Company for several years was purchasing power from Wilson Dam and we felt that we had the same right to buy the power as the power company had. We were interested in the national legislation disposing of this wartime project at Muscle Shoals. We would get what we called an advantage for buying non-transmitted power. We thought that cash-and-carry power should be less than transmitted power. In my original contract with Tennessee Valley Authority I would have bought it for 10 percent

less than the cities to which the power had to be transmitted, but, under the new proposal as submitted by Lilienthal, the Tennessee Valley Authority would exercise its option and buy the Florence distribution system from the power company and then rehabilitate it and resell it to the city of Florence. That proposal would have cost the city 20 percent in power and I objected. Florence has a good load factor, that is, probably 40 to 45 percent constant consumption of power. Some other towns had a very poor load factor, and, therefore, we would have probably contributed very heavily to l s populous towns. That was the reason that I objected to going into it.

My alternative proposal to Mr. Lilienthal was that I did not want to destroy existing power facilities. I had tried to buy the power company's system before I ever filed an application for a PWA loan. And would buy it now at a fair price but some money needs to be had to rehabilitate the existing system. And if Mr. Lilienthal would tell Mr. Ickes to let me amend my application, and pay the power company either in cash from PWA, or pay the power company in bonds and then give Mr. Ickes the remainder of the bonds, to rehabilitate it, I would do it today. That is what Mr. Ickes refused in his telegram to me.

"By Mr. Turner:

"Q. Is the rate for resale of power mentioned in that contract higher or lower than the prevailing rate of the Alabama Power Company in Florence?

201 "Mr. Scott. To which we object. It is wholly irrelevant and incompetent here. It is merely for the purpose of a comparison of rates, and the reasonableness of the Alabama Power Company's rates. It is not germane to the determination of the issues in these cases.

* * * * * * * *

"The Court. I will sustain the objection.

"Mr. Acheson. We note an exception. We offer to show at this point that the rates which will be put into effect by this city are far lower than the rates now charged by the Alabama Power Company."

Cross-examination

I became interested in the municipal operation of a power plant as a citizen before I was elected mayor. The steps I took as mayor to bring about the acquisition or construction of a municipal plant were the following: I first made an investigation of the State laws of the State of Alabama to see what they would permit a city to do that did not own its distribution system in the way of borrowing money. That investigation began, I would say, in November 1932. Florence is located abutting Wilson Dam, a power dam that is owned by the Government, built in 1917 and completed in 1928, for war purposes. After the dam was completed the water ran over it and went to waste. Part of the power therefrom was sold to Alabama Power Company. The Alabama Power Company came to Florence and purchased the tail end of a franchise in 1925. The franchise had just 8 years to run. We had no hopes of securing industries such as other towns would secure where the power company had franchises, therefore, we were very anxious, if we could, to buy power from the Government on the same basis that the Alabama Power Company was buying it. In 1927 we tried to drive a spearhead through the little town called Muscle Shoals and came to Washington and asked that they supply Muscle Shoals, which
202 is located right at us and which had given no franchise. The franchise we had given to the company still had a few years to run. We got nowhere with that. There has been a fight to engage in the power business since then. In 1932 I wrote our two senators and took it up with some neighboring towns and found that State legislation was needed as well as national legislation to assist us in this matter. In April 1933, the State of Alabama passed what is known as the Carmichael Act. It is a pretty broad Act and the major portion of it was drafted by the best city attorney in Alabama. It finally went up with many people having their fingers in it. It was adopted in April, 1933. It showed that the State of Alabama contemplated the neighboring cities borrowing money and issuing bonds and pledging the properties acquired as a security for the safety of the loan and the payment of the loan; and for the purpose of buying power from Wilson Dam, from the

Government at Wilson Dam, and for the purpose of borrowing money from the Reconstruction Finance Corporation or any other lender. Of course you do not pass a bill through the legislature in a day, you know, especially when it is contested and one of that nature. Along in March, 1933, we felt that the way would probably be clear for us to engage in the power business and we employed engineers to appraise the existing system belonging to the Alabama Power Company. The name of the engineer we employed was J. W. Johnson, who, we thought, was a very competent engineer. He employed assistants and along in July wrote to the Alabama Power Company and told them that we would like to buy their system and that we were hiring engineers to appraise it and it would be a little cheaper on us if they would help us with their records and their charts. The appraisal could be gotten by going out into the field but it would cost more. The power company was very cooperative and turned over their books and their papers to our engineer. He completed his appraisal,

203 I think, September 8, 1933. After we employed our engineer, the power company employed a firm of engineers by the name of Sirrine and Company and the appraisals were carried along, ours first and theirs just a little behind. On or about November 16, the power company and its engineers and the city and its engineers had a conference and they submitted a proposal of sale which was very liberal and fair except as to price. The terms were very liberal and fair—the interest rate, I mean. We were quite far apart on the price. They offered to sell for $195,000 and it looked like that was the last figure. I only offered them $95,000, I believe, either $95,000 or $100,000. I would have offered them $120,000, what my engineers said it was worth, but we were so far apart that we just broke off negotiations. My engineers said it was worth $120,000 but I did not like to start negotiations at that figure. After we failed in negotiations, we asked Mr. Johnson to begin preparation of an application to PWA for a loan in the event we failed to buy the existing system. The loan was for the purpose of financing the construction of a new system. The negotiations with the power company failed on November 16, 1933, and we filed our application with the PWA State Advisory Board in Montgomery for

a loan and grant November 20, 1933. I had great difficulty in getting the loan through. This file is about 400 pages and most of it is between me and my engineers and PWA trying to get the loan through. No one in PWA asked me to file this application. And the work was not greatly expedited by PWA. I had to bring Congressional and Senatorial pressure and every other sort of pressure on PWA to get them to do anything. Nobody urged me to make the application except the citizens. They voted about 14-1/2 to one to go into the power business and, I was their servant, a public official, and had been attempting to get them into the power business. My difficulties at Montgomery were very considerable and I had a hard time to get the loan through and had to bring help from Washing-
204 ton. We are still negotiating with the power company for the purchase of the system. The background of the telegram from Administrator Ickes and one from Mr. Lilienthal to me is as follows: Mr. Lilienthal, the TVA director in charge of power, had given me the contract that is now in evidence for the purchase of power from TVA if and when I could build a system or buy one. This, I think, is the last contract, and not the first contract with TVA. One was about March 1934, and the other about June 1934. There were two. Mr. Lilienthal made some minor changes in the first TVA contract and adopted a new contract and the city of Florence executed it. We took out some provisions that we thought were probably not legal. One part of it was in reference to the purchase of part of the property of TVA which could not be done. I thought it was a most favorable contract to Florence. It was the best I could do and I was anxious to get it signed. Throughout June Mr. Lilienthal promised to sign it up and then about July first he wrote me and told me that he was coming to Florence and said that he wanted a conference of all the mayors of all these 14 towns. That is the first I knew of the new plan. These 14 towns included the 7 here in litigation, with the exception of Guntersville and 8 others which are in the same area.

Mr. Lilienthal said that the system had some towns that were very profitable, like Decatur and Florence, and that it had some other towns like Courtland and Moulton, and other smaller towns that were not profitable. There was

one county that would not stand on its own feet even under the power company's rate. He said the Administration was opposed to the confiscation of property and that TVA had an arrangement, an option, with the power company for taking over all these 14 towns from the Alabama Power Company. They would have the transmission lines under another contract. The power company would just move out of this particular area and the Tennessee Valley Authority would own and operate it and would rehabilitate it, and, at some later date, would turn it over to the individual cities. Mr. Lilienthal suggested that these cities voluntarily request him to exercise this option with the Alabama Power Company. Then he proposed that TVA would purchase the distribution system within these cities from the company and take them over, rehabilitate them and operate them, TVA would put on a 10 percent surcharge on the rates, and eventually turn the systems over to the municipalities or counties. The power company had given TVA an option to acquire these properties for one million dollars. This arrangement fell through and the telegrams were sent because I did not want to go into this 14-city arrangement since it was not to my advantage, and I told Mr. Lilienthal that. He stated that the Administration did not want to destroy private systems by new systems and that this arrangement would prevent that. I told him that I was still willing to buy the power company's system but that I did not want to go into this plan with Tennessee Valley Authority. If the power company will still sell, and the Government will allow me to amend my application to buy from the power company and borrow from PWA to extend and rehabilitate it, I will still do it. If you will see Ickes and ask him if it is all right for me to do that, I will buy now. The telegrams were the result of this. Mr. Ickes and Mr. Lilienthal turned me down on this proposition.

Mr. Lilienthal did not definitely at any time offer to sell Florence the system of the power company within the city that TVA might acquire from the company under its option. He would only do it when it was rehabilitated and amortized. He did not at that time indicate the price, but subsequently indicated that he was paying the company $160,000 for its system in Florence. I had been willing

to have to pay the company $120,000 and they would have been willing to sell for $195,000. I never did amend my application in accordance with my alternate plan because they would not let me. Both contracts between the Tennessee Valley Authority and Florence have been cancelled.

206 The second contract was the one offered in evidence by the plaintiffs. I was put in this position of having to go in with TVA into the 14-cities system partly as a reason because they did not want to destroy existing systems. But that did not interest me. I said I would still buy from the Alabama Power Company if Mr. Lilienthal could get Mr. Ickes to allow me to amend my application to that end. I never filed an amendment. It developed later that if TVA had exercised its option and acquired these properties it would have been willing to sell the system in our city to us for $160,000, which was a higher price than we would have been willing to pay. That was one of my objections. I felt that they were paying more than the system was worth. I don't think that it was the attitude of either TVA or PWA to have me take steps which would destroy these properties or prevent my purchase of them from the company. They never expressed such an attitude to me, nor did their conduct ever indicate that they had that in mind. On the contrary they wanted to purchase them and not allow them to be destroyed. We could have financed the purchase of these properties without a loan from PWA in two ways: One by banking houses but at a cost of 15 or maybe 20 percent of the capital, and the other by local contributions which have been a drain on my community. Had we been unable to make a loan for the purchase, it was financially possible to purchase these properties because the power company had offered to take the city's revenue bonds.

Re-direct examination

Sometime prior to July 11, 1934, we had filed an application for a loan and grant from PWA for the purpose of building a distribution system and generating plant. On July 11th, it had been approved and the bonds were printed, and, an allotment had been made and we were ready to start. During that time TVA had entered into an arrangement with the Alabama Power Company by which TVA

was going to purchase distribution systems in 14
207 towns, one of which was our town. Mr. Lilienthal's telegram says that they wanted to avail themselves of the option. In that situation, Mr. Ickes telegraphed me that I alone was holding out, and, by that he meant that I alone was insisting on the loan and grant for the purpose of building a distributing system and generating plant. Then Mr. Ickes said in his telegram that the Administration would advance no funds to Florence for expenditures inconsistent with the TVA plan, which was TVA's plan to purchase the Alabama Power Company's properties. Mr. Ickes was saying that he would not go through with the allotment if it was inconsistent, and it was inconsistent with the TVA plan. Mr. Ickes also said that the allotment and grant would be maintained pending completion of the transaction between TVA and Alabama Power Company, by which he meant that he would maintain our allotment up until the time, if it occurred, when TVA and Alabama Power Company reached a deal on the sale of the properties.

Re-cross examination

TVA had a very short option in which to work out its negotiations with the power company for these projects. Mr. Ickes was saying that pending the TVA negotiations with the power company for purchases under this option that he would not disqualify my application. If the option was consummated my loan would be dead. If it was not consummated, my loan would be *in status quo*. Prior to July 1934, a loan and grant agreement had been signed with us. The original loan and grant agreement was dated December 28, 1934. The telegram from Mr. Ickes was July 1934. In between those dates I was advised by TVA that it was unable to consummate its plan. It was thereafter that the loan and grant agreement was executed. I was mistaken in saying that it had been executed by us but not by the Administrator. The allotment had been made and the PWA had been satisfied as to the legality of our loan and the financial structure and the engineering
208 structure prior to the date of Mr. Ickes' Telegram.

Further re-direct examination

TVA failed to consummate the option agreement to purchase these properties from the company on December 28, 1934, at the time I signed the PWA contract. Mr. Lilienthal addressed a letter to all the mayors about October or November 1934. One of the objections to my taking the Florence properties under the TVA plan was the fact that TVA attached rural lines to the municipal distribution system and required the city of Florence to operate that and sell at a price fixed by TVA. The TVA also attached small towns to the Florence system and they put on a 10 percent surcharge. I could have bought power 20 percent cheaper than I could have bought it under their plan. They wanted me to attach to the Florence system the rural lines in Lauderdale County in which Florence is situated and certain small towns in Lauderdale County and several other counties. The city of Florence, if it wanted to buy the system, would have to pay the TVA for its rural lines and for the small town distribution systems at such price as TVA deemed fair. TVA planned to take over the whole area, 14 towns and rural areas, rehabilitate the whole thing and that the 10 percent surcharge would amortize it, and then turn it back to the cities or counties. I did not know what they would return to the city of Florence and that was one of my objections to going in the plan. I was fearful that the rural lines in Lauderdale County would be turned back to the city and that the city would have to pay for them and operate them. I didn't see how you could unscramble the situation 15 years from now after the whole thing had been rehabilitated in rural areas and cities. I just preferred not to go in for many reasons. TVA submitted an ordinance to us for adoption which carried out their plan with reference to the operation of the property and we adopted it.

209 Further cross-examination

"(By Mr. Frank):

"Q. Mayor Glenn, you testified that you had received a letter from TVA concerning which opposing counsel asked you. Will you identify that letter? Is that the letter (indicating)? A. This was the document that went with that. It was an explanation.

"Mr. Frank. I would like to offer these two letters.

"Mr. Turner. Two letters?

"Mr. Frank. The one you handed the witness and the one to which the witness referred. He testified that these are what he had received, and he also received that.

"Mr. Acheson. I beg your pardon. He testified that he did not receive that. It is not addressed to him.

"The Witness. One of similar content.

"Mr. Frank. One of similar character.

"This is a letter from David E. Lilienthal, Director and General Counsel of the Tennessee Valley Authority. It is dated December 12, 1934, We offer it as Defendants' Exhibit No. 1."

"(Letter from David E. Lilienthal dated December 12, 1934, was marked 'Defendants' Exhibit 1 for identification'.)

"Mr. Frank. I ask that this enclosure be marked as Defendants' Exhibit No. 2 for identification.

"(The enclosure referred to was marked 'Defendants' Exhibit 2 for identification'.)"

. . . . . .

"The Court. I think it would be better to have them marked for identification and then to introduce them as a part of your case.

"Mr. Frank. All right. That is all."

Further re-direct examination

The import of this letter from Mr. Lilienthal was
210 that he had not notified the power company that he was going to cancel his option to purchase these distribution systems from it.

Whereupon the plaintiffs stated they had no further questions for the witness and he thereupon left the witness stand.

Whereupon **John P. Hodges** was called as a witness for and on behalf of the plaintiffs and having been first duly sworn, was examined and testified as follows:

Direct examination

My name is John P. Hodges and I am mayor of the town of Hartselle. My city made application to the Public Works Administration for a loan and grant to build an electric distribution system in our city. The clerk handled most

of the matter in connection with the application. The assessed valuation of the city of Hartselle for the year 1934 was $1,074,000 and was practically the same thing for 1935. The city has a bonded debt, the total of which is $81,000. There are no past due payments of interest or principal on those bonds. The Alabama Power Company is presently serving the city of Hartselle for its present requirements. There is no other organization at present able to serve the electricity requirements of the city of Hartselle and there is no other distribution system in the city. The clerk of the city can testify as to whether the city entered into any agreement with Tennessee Valley Authority with reference to supplying the city with electric power. I just don't know what that is.

Whereupon plaintiffs excused this witness.

Thereupon **Leon Livingston** was called as a witness for and on behalf of the plaintiffs, and, having been first duly sworn, was examined and testified as follows:

211 Direct examination

My name is Leon Livingston. I am familiar in a general way with the application of the town of Hartselle to the Public Works Administration for a loan and grant of money to build an electric distribution system. The contingent power contract, which is set forth in the application of the city to Public Works Administration for this loan and grant, is a contract whereby the customers of the Alabama Power Company agreed to take their power from the municipal system if and when it is built. I was not in office at the time the contract was circulated. My predecessor probably did circulate it. These contracts are on file in our office at this time. Practically all of the customers of Alabama Power Company signed those contracts. I do not have a copy of any of those contracts with me.

Cross examination

We had a municipal election in Hartselle on the municipal ownership of the power distribution system. The vote was 296 in favor of municipal ownership and 18 against it. The population of the city is 2300. The election was in 1933. It was held before I was in office but I have looked up the records. I took office January 1 of this year.

Whereupon there being no further questions for the witness, he was excused.

Whereupon **William J. Porter** was called as a witness on behalf of the plaintiffs and being first duly sworn testified as follows:

Direct examination

I am mayor of the town of Russellville, Alabama, and have been mayor since March 1, 1935. I was not mayor at
the time the town filed its application with the Public
212 Works Board, but I was a member of the City Coun-
cil. I am reasonably familiar with the application that the town made for a loan and grant. A contingent power contract, a copy of which was included in the application for the loan and grant, was circulated among the customers of Alabama Power Company in Russellville and signed by practically all of them. I think that at this time that something like 600 customers have signed, some have been added in the last few months. The population of Russellville at the last census was 3,060. The highest valuation of the town of Russellville for 1935 was $1,238,000 and it is practically the same for 1934. The bonded debt of the town is $77,500, none of which is in default. If the city builds its own electric distribution system it proposes to get power from the best source available. At the present time there are only two sources of power, one prospective and the other there. These sources are the Tennessee Valley Authority and the Alabama Power Company. The city had a contract with Tennessee Valley Authority for the purchase of power in event it built or acquired a distribution system. I do not know whether it is in effect or not. Under this contract we agreed to purchase all our requirements for this distribution system from the Tennessee Valley Authority and to resell the power to the customers at a price fixed by Tennessee Valley Authority. I do not know that this contract has been cancelled and I do not know whether it had an expiration date. The contract may still be in existence, but I could not answer that. I did not have all of the minutes of the town meetings but Mr. Adler has a good many in his file. Mr. Adler is a member of the firm of Lide & Adler. Alabama Power Company purchased the old distribution system in the city of Russellville and recon-

structed it. We had a very poor arrangement for light when they purchased it there in 1923. After purchasing the distribution system they rebuilt it out and out.

213 Cross-examination

We had an election in Russellville concerning whether the citizens down there wanted to build a municipal power plant. There were 508 votes cast, 405 for the erection of a municipal power plant and 103 against. The date of the election was December 7 or 13, 1933. The 30-days legal notice of the election was given and it was held following that.

Re-direct examination

I did not know the date of the allotment of funds for the loan and grant but the application was made sometime in 1933. The allotment was not to my knowledge held at any time at the request of Public Works Administration. To my knowledge there was no request by Tennessee Valley Authority or statement by Public Works Administration that they would withhold the loan and grant from the city until they could await the consummation of a deal between Alabama Power Company and Tennessee Valley Authority for the purchase of the Russellville distribution system. The city entered into an agreement with TVA whereby TVA was to purchase the distribution system and then resell it to the town. The agreement was in the form of a resolution of the City Council of Russellville, Alabama.

Whereupon the plaintiffs offered a copy of the resolution which was identified by the witness, and received in evidence as Plaintiffs' Exhibit No. 20, which is set forth in full as follows:

214 *Resolution*

WHEREAS, on the ELEVENTH day of DECEMBER 1933, the Citizens of the City of RUSSELLVILLE ALA. voted at a public referendum in favor of acquiring a municipal distribution system by purchase or construction for the purpose of distributing electricity purchased at wholesale from the Tennessee Valley Authority; and

WHEREAS, pursuant to the public mandate thus expressed, the City of RUSSELLVILLE, ALA. thereupon attempted without success to purchase the existing electric

distribution system from the Alabama Power Company; and

WHEREAS, the City of RUSSELLVILLE ALA. thereupon made application to the Federal Emergency Administration of Public Works for a loan and grant wherewith to construct a duplicate distribution system; and

WHEREAS, on THIRTEENTH day of MARCH 1934, the City of RUSSELLVILLE ALA. entered into a contract with the Tennessee Valley Authority whereby the City engaged to acquire a municipal distribution system by purchase or construction, and the Tennessee Valley Authority agreed to supply power at wholesale therefor; and

WHEREAS, it is desirable to avoid the wastes and hazards of a competitive electric distribution system if it is possible to do so without violating the mandate of the people of the City; and

WHEREAS, the Tennessee Valley Authority has been offered the existing electric distribution plant in the City at a fair price, and one substantially lower than has ever been offered to the City; and

WHEREAS, since the execution of the aforesaid contract between the City of RUSSELLVILLE ALA. and the Tennessee Valley Authority, representatives of the Authority and the City have worked out a plan whereby the City can acquire the existing distribution system without pledging its credit and without the wastes and hazards of a competitive electric plant, the said plan being as follows, towit:

1. The Tennessee Valley Authority will consummate the purchase of the existing distribution system within the City from the Alabama Power Company at a price which is fair to both consumers and investors.

2. The Authority will operate such system directly for a limited period during which the system will be completely rehabilitated, improved, extended and rearranged in order to establish it as an economic and efficient operating unit. The City will grant the Authority whatever franchise rights within its limits may be necessary for such direct operation. During such period of direct operation the Authority plans to extend the farm electric lines in the rural areas adjoining the City, such rural lines to be made a part of the existing system, and to be operated together with its urban

properties by the City. In this way, the City will assume responsibility for managing and operating a well equipped and efficient electric system which will be coextensive with the City's business and trade area so far as engineering and economic considerations permit. In cooperation with the Electric Home and Farm Authority, the Authority will further undertake an intensive program of residential, industrial, and commercial load development. All the activities which are to be undertaken by the Authority as described herein will be accomplished at the Authority's expense, but the actual net cost thereof will be added to the original cost of acquiring the system.

3. When the Authority has achieved the objectives above described, the period of direct operation by the Authority will terminate. The Authority will then transfer to the City the distribution system, so rehabilitated, improved, extended, and rearranged, at the actual cost to the Authority of such system, as recorded in its books of account, plus the actual recorded cost of such rehabilitation, improvement, extension, and rearrangement, subject to reduction as set forth below. The City will be supplied with such accounting records as may be necessary to establish the investment of the Authority in such system. The
216 transfer will be by appropriate instrument securing the interest of the Authority in said system.

4. During the period of direct operation, the Authority will add to its basic resale rates a surcharge of ten percent on all classes of customers, the proceeds of such additional charge, as well as all revenues in excess of the Authority's cost of operation to be applied toward the reduction of the purchase price to the City. Should the Authority, during such period of direct operation, operate other distribution systems in North Alabama under a similar plan, the Authority will compute the sums available for the reduction of the purchase price as for a single system, the City's system sharing pro rata in such reduction.

5. The City will pay the Authority for the system so purchased by turning over to the Authority all of its revenues from the operation of the system in excess of the cost of operation thereof. The City will purchase power from the Authority at its standard wholesale rates for transmitted

power, and will resell such power at the Authority's basic resale rates, plus an additional ten percent surcharge, until the Tennessee Valley Authority is entirely reimbursed for its investment.

6. In view of the benefits to the City arising from this plan, the City will act to modify or rescind the contract of THIRTEENTH day of MARCH 1934, with the Tennessee Valley Authority, to make it consistent with said plan, and thus enable the City to take advantage of this plan.

NOW, THEREFORE, the City COUNCIL of the City of RUSSELLVILLE, ALA. do hereby unanimously resolve that said plan be, and it is hereby, approved in every respect; that the Tennessee Valley Authority be petitioned to exercise its option to purchase the existing electric distribution system in the City and to proceed forthwith in carrying out the plan as above described; and that the contract of MARCH 13th 1934 with the Tennessee Valley Authority, be void and of no effect insofar as it may
217 conflict with the operation of said plan, the Mayor being hereby authorized to execute an agreement of amendment or rescission of said contract.

THIS 7th DAY OF JULY 1934

J H PORTER
City Clerk

W W RAMSEY
Mayor

(Imprint of seal: CITY OF RUSSELLVILLE RUSSELLVILLE ALABAMA)

218 I do not have any copies of letters in this file with Tennessee Valley Authority with reference to this resolution or the matter contained therein.

"Q. Do you know by whom this resolution was drawn?

"Mr. Scott. To which we object. It is unimportant and it is immaterial.

"The Court. I sustain the objection.

"Mr. Turner. We except, if your Honor please."

Whereupon the plaintiffs stated that they had no further questions for the witness and the defendants stated that they had no further cross-examination and the witness was excused.

Whereupon **L. D. Taylor** was called as a witness on behalf of the plaintiffs and, having been first duly
219 sworn was examined and testified as follows:

Direct examination

The population of the city of Guntersville is correctly stated in its application as 2,826. The city of Guntersville has filed an application with Public Works Administration for a loan and grant of moneys to build an electric distribution system. I am not familiar with that application. I cannot say for certain whether I was mayor of the city at the time that the application was made because I am just filling out an unexpired term. I am familiar with the contract obtained by the city whereby the citizens of Guntersville were to take their requirements of electricity from the municipal plant if and when it was established. We had an election on that to consider what they wanted and they voted for it. Afterwards we circulated a contract which was signed by the citizens to purchase the power. About 240 of the Alabama Power Company customers in the city signed this contract and about 70 did not. I do not know whether the city has a contract with Tennessee Valley Authority for the supplying of power to the municipal system if and when it is completed because the most of that business has been handled by our city attorney and I have not kept as familiar with it as I should. I think the City Council has taken action in the form of a resolution with reference to a contract with the Tennessee Valley Authority for the supply of power to the municipal system if and when it is established. The rate at which the city should resell power to the public is fixed in that resolution, I think. The city attorney knows the details.

Cross examination

We had an election in Guntersville on whether or not the citizens there desired a municipal power plant. To the best of my recollection 240 voted for it and about 60 or 70
220 against it. I do not remember when the election was held.

Whereupon, there being no further questions for the witness, he was excused.

Whereupon **Claude D. Scruggs** was called as a witness

on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination.

I am city attorney of Guntersville, and held that position at the time the application to the Public Works Administration was made. I am familiar with the heading in the application designating as contingent power contract. The first of these contracts was signed by approximately 300 of the consumers of electricity in Guntersville. There was a second contract which was signed by 10 or 15 fewer consumers than the first. In number that was practically all of the customers that Alabama Power Company has in that area. The assessed valuation of the city of Guntersville is shown in the application to be $990,000. The last year shown is 1933, I think. In 1934 it rose to $1,100,000 and for the year 1935, the latest available figure, it was $1,142,732, but since that assessment was made the city boundaries have been extended and there is approximately $200,000 additional added. The entire bonded general debt of the city is about $18,000. Some of the bonded debt has been paid since the application was filed, at which time it was $21,000. The city never had a contract with Tennessee Valley Authority for the supply of power. It has applied to Tennessee Valley Authority for power. We did not obtain a contract. Tennessee Valley Authority advised me that they would not negotiate or take it up with me until after the expiration of the power company contract with them to stay out of that territory. This was done orally. I know it was not done by correspondence. I talked to Mr. Lilienthal in person about it. There is no correspondence in the city's files concerning it.

221 Cross-examination.

Our city is located on the Tennessee River above Wilson Dam and we began to visualize getting some cheaper power. The first talk of it developed back about 1931 and it was about the time of the creation of the Muscle Shoals Commission by the States of Tennessee and Alabama. The Commission was created, I believe, in 1931, which first developed an interest so far as the city of Guntersville was concerned. That was when the interest began. It appears

that the Army Engineers had recommended the construction of certain dams, one of which was located near Guntersville. In 1933, I was in the Senate of the State of Alabama, and up until that time, there was very little opportunity for any of the cities to go into the power businesss in Alabama, if the cities had a competing system at that time. So in 1933 there was introduced in the House of Representatives what is known in common parlance in Alabama as the Carmichael Bill. It is my recollection that the bill passed and was approved in April 1933. It was introduced sometime prior to that but had been in the committees of the House or Senate on down to the time of its final passage. The session of the legislature adjourned before it was enacted. It finally reached the Senate and a number of us worked on it. Following the passage of this bill and after adjournment of the Senate, I went back to Guntersville and we discussed in Council meeting the feasibility of holding the election that was provided for by the Carmichael Act. This bill authorized the holding of these elections to determine whether or not the municipality should undertake these power projects. This bill permitted the city to issue revenue bonds and pledge the revenues from the system. And that money obtained from the sale of the bonds is security to the lender for the funds advanced. Our town did it on September 4, 1933. We held the election at that time and the result, I believe, was about
243 in favor of it and 70 against it. The city made
222 application to Public Works Administration about
November 20, 1933, according to my recollection. Nobody except the City Council and the citizens of Guntersville solicited us to do so. We had difficulty in getting action on the application. We got our application for the loan filed and then the matter was referred to the Advisory Board for the State of Alabama consisting of three members. The power company asked for and obtained a hearing. Later the application was sent on to Washington where no action was taken until finally in October, 1935, we got notice that the application had been granted. The loan and grant made to the amount of $87,272, being cut from $100,000 down to that. The city endeavored to purchase the property of the plaintiff located in the city. I wrote a letter on behalf of the mayor to the Alabama Power Company

asking them if they would sell it and at what price. Alabama Power Company replied in substance that they did not build the system for sale but as an investment and would not quote a price. I have not had subsequent negotiations with the company and no offer from them. I could not give the assessed valuation of the company's property in the city. I can fix it where you can figure it out. The amount of tax paid by them in the city of Guntersville, ad valorem tax, for the year 1935 was $183.76. That is based on a 5 mill tax and the assessed valuation is 60 percent of the actual valuation.

Re-direct examination

The Alabama Power Company pays a license tax, in addition to ad valorem taxes, of 2 percent on the gross receipts of the company's business in the city. The residential service amounted to $14,605.39 for the year 1935 upon which the 1936 tax is based. For commercial, it amounted to $13,535.02; for street lighting $2,418.84; and for industrial $34,182.70, making a grand total of $64,741.95. That is the amount the company paid as privilege license, that is 2 percent of that. The company also paid an addi-
223 tional privilege license for selling appliances.

Further cross-examination

The company has 380 residential consumers, 178 commercial consumers, 2 street light contracts, and 5 industrial contracts.

Whereupon there being no further questions for the witness, he was excused.

Whereupon **W. L. Farr** was called as a witness on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination

I am the mayor of Tuscumbia, and have been mayor a little over three and a half years. I was mayor at the time the city made an application to Public Works Administration for funds with which to build an electric distribution system. Prior to filing the application, the city, through Messrs. Lide & Adler, had negotiated with the power company for the sale of its distribution system therein, and, that was subsequent to the election whereby the citizens

voted in favor of building a municipal plant. The Alabama Power Company is the only company, person or corporation presently engaged in the electric business in Tuscumbia and is the only person able to supply the electric requirements of the city and its inhabitants. The approximate population of the city is about 4,500. The bonded indebtedness of the city is $705,276, of this amount, $677,000 are in default as to principal and interest.

Cross-examination

We had an election in Tuscumbia as to whether or not the citizens wanted a municipal plant. The election was held August 30, 1933, and the vote was about 40 to 1 in favor of going into the electric business. There were 330 votes in favor of it and 8 against it.

224 Whereupon there being no further questions for the witness, he was excused.

Whereupon **Hoyt Greer** was called as a witness on behalf of the plaintiffs and having been first duly sworn was examined and testified as follows:

Direct examination

I am president of the City Commission of the City of Sheffield, and have been president about 8 months. I have been a member of the City Commission since October 1933. I was not a member of the commission at the time the city filed its application for a loan from Public Works Administration. I am generally familiar with the application. An allotment has been made for the loan, and, we have previously entered into an agreement with Public Works Administration in reference to that. The Alabama Power Company is the only company in the city with a distribution system serving the inhabitants of the city. The city does supply lights and power for a "White Way" with a connection to the Tennessee Valley Authority plants that are adjacent to the city. The Alabama Power Company has paid the city its occupational licenses for all years except 1936. The company tendered the amount of the tax this year and the city refused it. The company has paid this occupational license tax or franchise tax ever since the expiration of its former franchise. We do not have a contract with Tennessee Valley Authority to supply power

to the municipal system when it is built. We did have such a contract which was cancelled possibly in the fall, or maybe in July, 1934. We have reasonable knowledge that we could purchase the power from Tennessee Valley Authority if we had a distribution system. Tennessee Valley Authority has power for sale and the city is in its territory, and Tennessee Valley Authority would sell it to us if we had a place to use it.

225 Cross examination

We had an election in Sheffield on the question of whether or not the city should have a municipal plant. The election was held in June 1933, I think. And there were 630 votes in favor of it and 36 votes against it.

Whereupon there being no further questions the witness was excused.

Whereupon **Clyde Hendrix** was called as a witness on behalf of the plaintiffs and having been first duly sworn, was examined and testified as follows:

Direct examination

I am a member of the City Council of Decatur and Chairman of the Finance Committee of the City Council. I have been a member of the council for about 20 years. The population of Decatur is approximately 16,000 in the last census and is estimated now at from 18 to 20 thousand. The assessed valuation of property in the city of Decatur for 1934 was $8,071,000, and for 1935, $8,550,000. It is my understanding that this figure does not include certain ad valorem values that will be coming in the next year or two or three. That is the assessment, however, for 1934 and 1935. The bonded debt of the city on January 1, 1936, was $1,777,600. The city does not have any contract with any person, firm or corporation for a supply of power to the municipal system if and when it is established. We did have such a contract with the Tennessee Valley Authority which was cancelled about July 1934. Decatur is about 30 miles from the Muscle Shoals power plant. We have about a half a million dollars in bonds in default as to principal and practically every issue is in default as to interest, with the exception of some school bonds which the taxes provide for and another issue of public improvements of about

$200,000. The city is being sued to enforce the pay-
226 ment of the bonds and interest in two different instances. One is purely a test case in connection with an increased revenue that we are undertaking to levy. You might term that as a friendly suit. The owners of the bonds have brought suit to establish the value of increased ad valorem taxation. The election to determine whether the voters would approve the acquisition of a municipal plant was held in Decatur on the 31st of October, 1933, I think. I was living in Decatur at that time. The result of the election was 1,415 for the city undertaking the venture and 501 against.

"Q. Do you know whether at that time there was in Decatur an organization known as the Tax and Rate Payers Committee of Decatur?

"Mr. Scott. I object, because it is incompetent, irrelevant and immaterial, and pertains to matters without the scope of the issues here, and is simply going to be for the purpose of laying the foundation to introduce other irrelevant matter here. That is the purpose.

"The Court. I do not quite see its relevancy.

"Mr. Jackson. It is a preliminary question, your Honor. I am asking it as a foundation question. I think, if your Honor will permit it, its relevancy will be clear.

"The Court. I will overrule your objection.

"Mr. Scott. Exception.

"The Witness. I heard of it, yes.

"By Mr. Jackson:

"Q. Were you a member of it?

"Mr. Scott. To which we object.

"The Court. I sustain the objection.

"By Mr. Jackson:

"Q. Were you a resident of Decatur at the time of the election? A. Yes, sir.

227 Whereupon the plaintiffs marked as Plaintiffs' Exhibit No. 21 for identification a paper purporting to be an advertisement in the Decatur Daily of Saturday, October 28, 1933.

The witness identified Plaintiffs' Exhibit No. 21 for identification as a newspaper advertisement in the Decatur

Daily, Saturday, October 28, 1933, which was circulated in the newspaper in Decatur at that time and prior to the municipal election of October 31, 1933, stating that he had seen this as circulated in Decatur before the election.

Whereupon plaintiffs offered in evidence, Plaintiffs' Exhibit No. 21, for identification which was duly identified by the witness, stating that the purpose for which this exhibit was offered was to show that there was a causal connection between the holding out of gifts and unsecured loans of federal funds for the construction of municipal electric plants in various places in the United States—and particularly in Decatur—and the action of the municipality in building an electric plant.

"Mr. Scott. At this time, if your Honor please, the defendants object for the reason that the exhibit offered purports to be a newspaper advertisement pertaining to a collateral and irrelevant matter. Its authority has not been properly established. The piece is hearsay, self-serving, and offered for the purpose of supporting the opinion and conclusion of the plaintiffs concerning what dominated the mental attitude of the citizens of the town in voting on the power plant.

"We object to it for the further reason that it has not been shown that any of these defendants had any connection with the printing of such advertisement. It is wholly incompetent, irrelevant, and immaterial, and without the scope of the issues here.

"Mr. Frank. May I put in somewhat simpler terms an objection I would like to make? This is a question
228 of legal causation. If your Honor allows that advertisement in, the record will look like an annual bound volume of newspaper files, because the plaintiffs have manifested, in depositions taken, an intention to clutter this record with that sort of newspaper articles. We will have, then, to go into the collateral issues—

"The Court. You do not need to say any more. I will sustain the objection. I do not think this is any occasion for newspaper advertisements.

"Mr. Jackson. We may have, I assume, an exception?

"The Court. Yes."

Plaintiffs Exhibit No. 21 for identification reads as follows:

"THE DECATUR DAILY, SATURDAY, OCTOBER 28, 1933. ANSWER TO THE TAX AND RATE PAYERS COMMITTEE OF DECATUR. JOHN PATTERSON, CHAIRMAN. ANSWERED BY MARTIN J. LYDE, CONSULTING ENGINEER.

"Q. What will this experiment cost Decatur? A. Not one penny. The Government lends the money and takes a mortgage on the distribution system. If it succeeds (and it will) the people of Decatur profit. If it fails the Government loses. The object of the loan is to promote employment. The City has all to gain and nothing to lose.

"Q. Where would we get the money and at what interest rate? A. The City would borrow it from the Government at 4%.

"Q. How will the money borrowed be repaid? A. It will be repaid out of money derived from sale of electrical power by setting aside a sinking fund of 3.36%, if the loan is for 20 years, and if the loan is for a longer period then less.

"Q. How would the loan affect the City's credit? A. It would benefit it greatly. Anybody's credit is improved by an additional income. The loan is not a general obligation of the city. It does not increase its general debt, nor
229 does it affect its credit.

"Q. When the City needs more money will electric rates be raised? A. No. Under the T. V. A. regulations the income from the distribution plant must be kept separated from the general City revenues. Under the Carmichael Act the City cannot charge rates in excess of those fixed by the Public Service Commission for similar cities.

"Q. Who will pay the taxes we lose from the local power company? A. Last year the Alabama Power Company paid the City of Decatur in License and Advalorem taxes $6,416.04. The Alabama Power Company took away from the city in gross income $179,000.00. If we get the $179,000.00 the Power Company takes away from the city, then we can well afford to lose the taxes they pay.

"Q. Can we expect good service from political operation? A. Absolutely. The plant will be designed and constructed under Government supervision. It will be managed by a non-political board under regulations prescribed

by the Authority and under a system of accounting installed by the T. V. A. It will have the constant attention and supervision of a high class corps of T. V. A. engineers.

"Q. Why not pay our present debts before incurring new ones? A. Because we can't. With the additional income from this Government investment we can improve conditions by keeping at home $179,000.00 each year that is now being taken away by the power trust."

"LOOK THE FACTS IN THE FACE. VOTE FOR MUNICIPAL OWNERSHIP NEXT TUESDAY."

"(Paid political advertisement authorized by the Citizens Committee.)"

Whereupon the Plaintiffs marked a document purporting to be an advertisement in the Decatur Daily of October 26, 1933, as Plaintiffs' Exhibit No. 22 for identification. The witness identified Plaintiffs' Exhibit No. 22 for identification as a newspaper advertisement that was circulated in Decatur prior to the municipal election of October 31, 1933.

230

Whereupon Plaintiffs offered Plaintiffs Exhibit No. 22 for identification in evidence for the same purpose as stated in connection with the offer of Exhibit No. 21 for identification. The defendants made the same objection as was made to the offer of Plaintiffs Exhibit No. 21 for identification. The Court made the same ruling as it made on the offer of Plaintiffs' Exhibit 21 for identification and the plaintiffs noted their exception to the ruling.

Plaintiffs Exhibit No. 22 for identification reads as follows:

"THE DECATUR DAILY, THURSDAY, OCTOBER 26, 1933.

"STATEMENT OF DAVID E. LILIENTHAL

"September 15, 1933—Decatur Daily:

"At the direction of the board of directors of the TVA, rates for electricity supplied from the publicly owned plant at Muscle Shoals have been formulated, after weeks of careful study of costs and market factors."

"Any municipality, in the area we plan to serve initially, which owns its distribution system, assuming half-time

use, may secure wholesale power from the Authority at an average cost to it of 7 mills a kilowatt hour. We propose that our municipal wholesale customers charge the individual residence consumer in the towns and cities thus served a maximum gross rate of 3 cents a kilowatt hour for the first block and for subsequent blocks 2 cents, 1 cent and 4 mills. For the typical general consumer this is an average of about 2 cents a kilowatt hour, and for the typical limited user an average of about 2, 3, 4 cents. For a fully electrified home—which is our objective—the rate would average 7 mills per kilowatt hour."

"The farm user, we propose, should pay the same rate for energy as the town or city householder. These schedules, both town and farm, carry with them a requirement that the customer use a reasonable amount per month as minimum requirements vary, both in urban and farm
231 territory, with the size of the customer's meter. Farm users will have a large minimum requirement wherever the greater distances between consumers result in increased cost of service."

"These wholesale rates have been computed on a constructive basis to cover the costs of furnishing the service, including operation, maintenance, depreciation and taxes. In addition to these costs, we have made provision for interest and retirement, although such provision is not required by the TVA Act. The Power project is designed to be strictly self-supporting and self-liquidating."

"We believe that these low rates will mean that the people of the Valley will greatly increase their use of electricity—which is one of the objectives of the President and Congress. If this occurs, even lower rates can be planned for the future."

"The proposed rates to the householder and farmer should be explained in more detail. Under the rate for domestic service, it is proposed that for the first 50 kilowatt hours which the householder uses he shall pay 3 cents a kilowatt. These 50 kilowatt hours, in the ordinary small or medium sized house, would care for lights, and small electrical appliances, such as the flat iron, toaster, percolator, vacuum sweeper, washing machine and similar small devices. For these 50 kilowatt hours the user would pay $1.50. If the consumer has an electric refrigerator and an elec-

tric range, which consume 200 kilowatts, 150 of these kilowatt hours per month he would get for 2 cents per kilowatt hour, and the remaining 50 kilowatts at 1 cent. If in addition to electric refrigerator and range the customer had an electric hot water heater, this service he could secure partly for 1 cent per kilowatt hour and partly for 4 mills per kilowatt hour. All these services the consumer would receive for $6.70 a month. Any other appliances which the customer installed, such as electric house heating or cooling, he could operate at 4 mills per kilowatt hour."

232 "It is apparent that the rates proposed are designated to encourage and make possible the widest use of electric service, with all the individual and community benefits which go with such wide use."

"The foregoing statement of David E. Lilienthal, member of TVA, answers all the objections of the opposition to municipal ownership.

"LAMAR PENNEY,
Chairman

H. R. SUMMER
OTTO MOEBES
ROBERT DOSS"

"(Paid political advertising authorized by the Citizens Committee)."

Plaintiffs stated that in connection with these exhibits, and other exhibits, they made a general offer to show that not only in Decatur, one of the cases involved in these suits, but in many municipalities, the holdout of gifts and liberal loans from the Federal Treasury has been an argument submitted to the voters of municipalities to persuade them to embark upon a program of municipal ownership and competition with existing electric distribution systems.

Plaintiffs also offered to show, through proof of the circulation of such advertisements as these, that elsewhere, as well as in Decatur, that the offer by these defendants of this reward, in effect, to municipalities to do the things which are injuring these plaintiffs has been used as a means of procuring municipal action to inflict the injuries here complained of.

The defendants stated on the record that this was no proper offer because it was too general and indefinite, and, furthermore, that the type of testimony outlined in the plaintiffs offer is collateral to the issues and entirely irrelevant and immaterial.

The Court gave the plaintiffs leave to prepare a
233 more careful offer and submit it later.

Whereupon there being no further questions for the witness, he was excused.

Whereupon **Edgar W. Robinson** was recalled as a witness on behalf of the plaintiffs and having been previously duly sworn testified further as follows:

Further direct examination

I am superintendent of transmission and distribution for the Alabama Power Company and I am familiar with the distribution systems at Decatur, Russellville, Guntersville and Hartselle. I am familiar with the company's operating costs of those cities with reference to the gross revenue. I am prepared to give the percentage of gross revenue from each of those cities necessary for operation and maintenance. With our present rates and the diversity of customers we have, that is the proportions of the different kinds of customers, the local costs of operation and maintenance percentage run from 20 to 25 percent of the gross revenues. That is the local costs, not the general or overhead expense. Assuming that we did lose practically all of our customers in Guntersville, Russellville and Hartselle, we would not have enough gross revenue to pay our operating cost in those cities. As long as we retained any considerable percentage of customers, say 10 or 15 percent even, they would be scattered over the distribution system so that we would have to operate and maintain all of it, which would mean that we would substantially require the same line crews and operating personnel of that sort as we now have. We have to keep our meter readers and our commercial accounting functions as long as we operated at all. We would have to have service and trouble men, our local managers and our cashiers. All those functions would continue and they would require about the same personnel, so that even if there was an enormous decrease in the number of cus-

234 tomers and the revenues, our local operating expenses would be substantially as they are now, so that it would obviously be unprofitable to continue operation.

"Q. Now, assume that in the city of Decatur, you lost 95% of your domestic customers and 70% of your commercial customers and 75% of the industrial customers, would there be in your opinion enough revenue left to pay the operating and maintenance expenses of that distribution system?

"Mr. Scott. To which we object, your Honor.

"The Court. The same ruling. I think they are entitled to show that, particularly on the question of their standing as plaintiffs.

"Mr. Scott. Note us an exception, please.

"The witness: "A. Our local operating expenses under those conditions would, in my opinion, exceed the gross revenue, based on your assumptions."

Whereupon there being no further questions for the witness, he was excused.

235 Plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 24 the following stipulation:

The parties in Equity No. 58927, Texas Utilities Company v. Ickes, et al., by their attorneys hereby stipulate and agree for the purposes of this cause that the facts hereinafter set forth are true, and may be regarded as proved herein by competent evidence, subject to the right of either party to object to the relevancy of any fact contained herein.

Paragraph I

Texas Utilities Company is a corporation organized and existing under the laws of the State of Texas, is a resident and citizen of the State of Texas, and has its principal office and corporate domicile in the City of Plainview, Hale County, Texas.

Paragraph II

Harold L. Ickes is the duly appointed, qualified and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called PWA), appointed by Executive Order of the President of the United States

of America dated July 8, 1933, in pursuance of the provisions of Section 201(a) of Title II of the National Industrial Recovery Act;

Horatio B. Hackett is the duly appointed, qualified and acting Assistant Administrator of PWA;

J. J. Madigan is the duly appointed, qualified Acting Executive Officer of PWA;

F. E. Schnepfe is the duly appointed, qualified and acting Director of Projects Division of PWA;

Henry Morgenthau, Jr. is the duly appointed, qualified and acting Secretary of the Treasury of the United States, and as such has general supervision and control over the disbursement of the public funds of the United States;

W. A. Julian is the duly appointed, qualified and acting Treasurer of the United States, and, as such, is under the supervision of the said Secretary of the Treasury, in
236 control of the payment by means of public funds of the United States of checks drawn upon him; and

Guy Allen is the duly appointed, qualified and acting Chief Disbursing Officer of the Treasury Department, and, as such, is at the head of the Division of Disbursement of the Treasury Department, and is in control of the actual drawing and issuing of checks on behalf of the United States, and the actual disbursements of the public funds of the United States.

Paragraph III

On or about the 15th day of April 1909, the City Council of the City of Plainview, Texas, passed its ordinance No. 23, a true copy of which is hereto attached, marked Exhibit "A". On or about the 17th day of November, 1915, Charles A. Malone and R. C. Malone executed an assignment of said franchise to Texas Utilities Compny, a true copy of which is attached hereto as Exhibit "B". Said Company owns an electric power plant and distribution system in said City, which system is connected by said Company's transmission lines with its central power plant at Tuco, Hale County, Texas, which supplies said distributing system with electric current, and has been and is now engaged in the business of distributing and selling electricity to the inhabitants of said City and to the City itself. A true copy of the contract in force between the said City and the said

Company regarding such electric service is attached as Exhibit "C" and made a part hereof.

Paragraph IV

Plaintiff is and for many years has been a taxpayer of the United States, and has paid many thousands of dollars in income and excise taxes to the United States, and is subject to the obligation of paying hereafter many thousands of dollars in such taxes, and is a purchaser and consumer of commodities subject to taxes payable to the United States. For the year 1934 the plaintiff paid or in-
237 curred liability to pay taxes to the United States, applicable to its electrical properties, operation and sales in Texas, in the sum of more than Twenty-Six Thousand Seven Hundred Fifty Dollars ($26,750.00).

Paragraph V

Plaintiff is and for many years has been a taxpayer of the City of Plainview, of Hale County and of the various taxing districts located wholly or in part in Hale County, and of the State of Texas, and with respect to its electrical properties, operations and sales has paid substantial amounts in taxes to said City, County and subdivisions, and State, and plaintiff is subject to the obligation of paying substantial amounts in such taxes in the future.

Paragraph VI

On or about August 17, 1935, the Federal Emergency Administrator of Public Works and the City of Plainview executed an agreement, a true copy of which is attached hereto as Exhibit "D" and made a part hereof. On or about November 18, 1935, the said parties executed another agreement, a true copy of which is attached hereto as Exhibit "E" and made a part hereof. On December 4, 1935, there was delivered to said city by said Administrator, an offer duly executed by the Assistant Administrator, a true copy of which is attached hereto as Exhibit "F" and made a part hereof. Said offer was duly accepted by said city on December 9, 1935.

Dean G. Acheson
Attorney for Plaintiff
Alexander Holtzoff
Attorney for Defendants

238 *Exhibit A.*

April 15th, 1909

Ordinance No. 28.

An ordinance granting to Chas. A. Malone, R. C. Malone, and their associates the right to construct, operate, and maintain an electric light and power plant in the City of Plainview, Texas.

Be it ordained by the City council of the City of Plainview, Texas:

Section 1. That Chas. A. Malone, R. C. Malone, their associates, successors and assigns, be and they are hereby granted the right to construct and operate and maintain over, along and across all the streets, alleys and public highways of the City of Plainview, Texas, in accordance with all reasonable ordinances of said City, now in force and hereafter to be passed by the City Council of said city, an electric light and power plant.

Section 2. The plant shall be constructed so as to not interfere with the free use of the public of all streets and alleys and public highways. Any damage done to the streets, alleys and public highways shall be properly repaired by the said Chas. A. Malone, R. C. Malone, and their associates or at their expense.

Section 3. This franchise is granted for the period of 50 years. The said Chas. A. Malone, R. C. Malone, for themselves and their associates and assigns have consented in consideration of said grant, that the City of Plainview may place a system of fire alarm wire and fixtures on all of their poles belonging to said Electric Light and Power Plant, the same to be attached under the supervision of said owners of said plant at such places as they think best, but at the expense of the City and the same shall be maintained by the City at its expense.

239 Section 4. This franchise shall lapse and be of no force and effect unless construction begins within sixty (60) days and from the passage of this ordinance and the plant shall be in operation within six months from the time of the commencement of the construction.

Section 5. The failure of the grantees herein to comply with any one or part of any one of said above sections shall operate as a forfeiture of this franchise.

Section 6. The conditions requiring the passage of this ordinance create an emergency and imperative public necessity exists, the rule requiring the ordinance to be read on three several days be suspended and that this ordinance take effect and be in force from and after its passage and it is so enacted.

Passed and approved at a called session of the City Council of the City of Plainview, Texas, this 15th day of April 1909.

(Signed) Jas. R. DeLay—*Mayor*

Attest:
(Seal)
(Signed) J. F. Bander, *City Secretary*

240 *Exhibit C.*

PUMPING AND LIGHTING CONTRACT WITH THE CITY OF PLAINVIEW

MINUTES OF THE REGULAR SESSION OF THE CITY COUNCIL OF THE CITY OF PLAINVIEW, TEXAS, MARCH 7th, 1927.

Be It Remembered that on this the 7th. day of March, A. D., 1927, the City Council of the City of Plainview, Texas, convened in regular session at the City Hall in said City, at which meeting there were present W. E. Risser, Mayor, and J. C. Hooper, J. L. Guest, D. M. Thompson, W. E. Boyd and J. B. Cardwell, being all of the Councilmen of the said City.

There came on to be considered at said meeting the proposal from Texas Utilities Company, a corporation under the laws of Texas, to furnish electric light and power and do certain pumping of the city water by contract with the City of Plainview.

And it appearing to the said City Council of said City of Plainview that said Texas Utilities Company proposes to furnish said electric light and power, and pumping service to the said City of Plainview, for the periods, in the manner and upon the conditions hereinafter fully set out in a written contract this day made and entered into by and between said City of Plainview and the said Texas Utilities Company, at the prices hereinafter set out in said contract, which is made a part of these minutes.

And the said City Council of the City of Plainview, Texas, having had said proposal under consideration, and said City Council having carefully and fully considered said proposal, and having made careful investigation with reference thereto, and being of the opinion that said proposal is fair and reasonable and to the best interest of said City of Plainview, and the inhabitants thereof, the following motion was made, seconded and unanimously adopted, the said proposal of said Texas Utilities Company be and
the same is hereby in all things accepted and adopted
241 by said City Council of the said City of Plainview,
Texas, and said proposal submitted in the form of a written contract, as hereinafter set out, be formally signed in triplicate originals for and on behalf of the City of Plainview, Texas, by W. E. Risser, Mayor, and Geo. H. H. Saigling, City Secretary, and a copy of said original contract be made a part of the official minutes of this meeting of said City Council of Plainview, Texas, and two executed copies be delivered to said Texas Utilities Company.

The said contract between the City of Plainview, Texas, and Texas Utilities Company, reduced to writing and executed by the parties as aforesaid, as constituting the contract between said parties is as follows, to-wit:

THE STATE OF TEXAS,
County of Hale, City of Plainview:

THIS AGREEMENT made and entered into this 7th day of March, A. D., 1927, by and between the City of Plainview, Texas, a municipal corporation under the general laws of Texas, acting herein by and through its Mayor, W. E. Risser, and its City Secretary, George Saigling, hereunto duly authorized by the City Council of the City of Plainview, Texas, hereinafter called the "City", and Texas Utilities Company, a private corporation of Texas, incorporated under the laws of the State of Texas, acting herein by and through I. R. Kelso, its President, and attested by J. B. Scott, its Secretary, hereunto duly authorized, and hereinafter called the "Company," Witnesseth:

Division One of Contract

City Pumping

1. Equipment Furnished by Company—The Company agrees and binds itself to furnish all wells, machinery and power necessary for the purpose, and to operate all machinery for the purpose, and to pump all of the City's water from such wells into the reservoir, elevated tanks and water works system of the City, and to furnish to the City all necessary water during the term of this contract upon the terms, conditions, in the manner and at the prices hereinafter set out.

242 2. Equipment Furnished by City—The City agrees to furnish all necessary reservoirs, tank or tanks, pipes, mains, valves and fittings requi d to connect the Company's pumping equipment to the City's reservoirs, elevated tanks or tanks and distribution system.

The wells, machinery, buildings and equipment furnished by the Company shall remain the property of the Company.

3. Certain Terms Defined—Wherever the term or expression "Present Pumping Site," is used or occurs in this contract it shall be construed to mean and refer to the present pumping plant and equipment as now located at or near the power plant of the Company.

Wherever the ter or expression, "Austin Street Lot," is used or occurs in this contract it shall be construed to mean and refer to a lot to be secured by the City for use of the Company in putting in a new well, and shall be located at or near the corner of Austin and Eleventh Streets in said City, said Austin Street Lot to be located conveniently to connect to the present eight (8) inch water mains. For convenience the Austin Street Lot shall be included in the terms or expression "Present Pumping Site."

Wherever the term or expression "New Pumping Site," is used or occurs in this contract, it shall be construed to mean and refer to a certain five (5) acre tract recently purchased by the City for its new water works site located in Block No. 11, Boswell Heights Addition to the City of Plainview, Texas, or such other site in that locality as may be acquired by the City.

4. Pumping Head—This contract for pumping water is based on the pumping head at the present pumping site and the new pumping site as follows:

The total pumping head, including lift and discharge, shall not exceed Two Hundred and Ten (210) feet; it being understood that the City shall install water mains of sufficient size for connecting pumping plants to distribution systems so that the total head shall not exceed said head of Two Hundred and Ten (210) feet.

243 5. Continuous Service—The Company agrees to furnish continuous service as hereinabove provided for, furnishing to the City a supply of water into the water mains of the City sufficient to maintain pressure in said mains of Fifty-Two (52) pounds per square inch, and it is specially stipulated that for each and every period of time exceeding Twenty-Four (24) hours during which the Company shall fail to furnish such water supply at such pressure it shall pay to the City Five Hundred ($500.00) Dollars for each and every day after the expiration of said Twenty-four (24) hour period as liquidated damages until the service and pressure, above provided for, shall be reestablished and maintained by the Company, or until the City shall declare this contract terminated, which the City shall have the absolute right to do at any time after any continuous failure to keep such supply and pressure of water for any period of Ten (10) days or more (unless such failure shall be due to the failure of the City to maintain proper mains and equipment to insure said pressure), and it is specially provided that if the City shall terminate the contract under the provisions of this paragraph that the Company shall nevertheless be bound to furnish water as herein agreed for a period of One (1) year thereafter, during which period the Company shall be bound to operate said plant and system as nearly in accordance with the provisions of this contract as may be practical, but during such year shall not be liable for the liquidated damages above mentioned, but shall be liable to the City for actual damages, and should the Company not so operate said plant at any time during said year the City shall have the right to operate same, or have same operated, and charge the expense thereof against the payments to be made by the City (as actual damages sustained by the City) to the Company for services during that time.

The Company agrees to furnish continuous service as hereinabove provided, unless prevented from doing so by

such strikes, fires, accidents, or acts of God, as to render it practically impossible to perform the services, and shall be excused from performance only in the event that
244 the Company cannot by the use of all diligence and facilities within its power, including the power which might be made available from high lines from other points or resorted to by the Company to meet the emergencies or re-establish continuous service, nor unless the Company shall use all practical diligence and resources at its command to re-establish said continuous services.

The above provision requiring continuous service shall not be construed to obligate the Company to guarantee or insure the source of water supply to the City, but is based upon pumping conditions herein agreed upon, nor as binding the Company as an insurer against loss or damage resulting from fire; but it is expressly provided that should the water supply, as contemplated by this contract, prove insufficient for use of the City that this contract may terminate at the option of the City.

6. City Reserves Right to Designate Pumping Site to Be Used—It is understood and agreed that the water shall be pumped by the Company at the present pumping site until such time as the City elects to order the Company to pump the water at the new pumping site.

It is agreed that before the new pumping site shall be available for use as a pumping site under the terms of this contract that the City shall install the necessary reservoir on said new pumping site and install the necessary mains connecting the new pumping site to the present stand pipe, said mains to be of sufficient size to comply with the conditions and requirements hereinabove set out.

7. Use of City Property—In the event that it shall become necessary for the Company to use the new pumping site, or necessary to locate a well and pumping equipment of the Company's on property belonging to the City in connection with the present pumping site, then this contract shall be considered as a lease of the necessary ground for such well and pumping equipment from the City to the Company during the term of this contract, and at the expiration of this contract, if it be not renewed, the Company shall be entitled to remove all machinery and prop-
245 erty placed thereon by the Company, provided, how-

ever, that the Company shall leave all wells on said property in good condition, so far as practical, and if requested by the City shall leave all casing in said wells, in which event the City shall, upon demand, at any time thereafter made, pay to the Company the reasonable value of said casing so left in said wells.

8. Pumping Rates—The Company agrees to pump the water supply at its present pumping site at the following schedule of rates and charges:

Five (5) Cents per One Thousand (1,000) Gallons for the first Fifteen Million (15,000,000) Gallons of water delivered to the City per month at the present pumping site;

Four (4) Cents per One Thousand (1,000) gallons for all water delivered to the City in excess of Fifteen Million (15,000,000) Gallons per month at the present pumping site.

Rates New Pumping Site:

Five and a half (5½) Cents per One Thousand (1,000) Gallons for the first Fifteen Million (15,000,000) Gallons of water delivered to the City per month at new pumping site;

Five Cents per One Thousand (1,000) Gallons for the next Ten Million (10,000,000) Gallons of water delivered to the City per month at new pumping site:

Four (4) Cents per One Thousand (1,000) Gallons for all water delivered to the City in excess of Twenty-Five Million (25,000,000) Gallons per month at new pumping site.

Division Two of Contract

Street Lighting

1. The Company agrees to install, maintain and operate a street lighting system of 283 lights consisting of 133 Whiteway Standards of 250 candle power each, located in what is known as the business section of the City, and 150 bracket type lights of 100 candle power each, located in residential sections of the City. All of said lights are to be installed at locations designated by the City Council as shown
246 on map designating locations of said lights hereto attached for reference.

2. White Way Standards—The 133 Whiteway Standards of 250 candle power each to be installed at locations desig-

nated on the map hereto attached are to be installed, maintained and operated by the Company in connection with the 150 bracket type lights of 100 candle power each to be installed under this contract, said bracket type lights to be of the type and include the brackets now installed and used for street lighting purposes in the residential district, the map for convenience is hereinafter referred to as Exhibit "A".

3. Installed when—All of said Standard Whiteway lights and bracket type lights, shown on Exhibit "A" are to be installed as soon as possible. The Company will order the materials for the street lighting system as soon as the contract is executed. The Company agrees that under favorable working conditions and reasonable delivery of materials to complete the installation of the street lighting system within approximately Ninety (90) days after the receipt of a resolution of the City Council setting out its approval of the selection of Whiteway Standards to be installed under this contract. The City agrees to pass resolution approving type of Standard to be selected from catalogue furnished the City by the Comany.

The Street Lighting System installed by the Company will be of high grade materials, and installed in a workmanlike manner, and any damage done to paving, sidewalks or curbing will be repaired by the Company without cost to the City.

4. Price of Lights—The City agrees to pay to the Company a flat rate of $595.00 Dollars per month for the 283 lights to be installed hereunder as shown on Exhibit "A".

The City agrees to pay $3.00 per month for all additional candle power Whiteway Standards installed in addition to the 133 250 candle power Whiteway Standards shown on Exhibit "A", provided, however, that the City shall have the right to order the extension of Whiteway Standards as and when the City may see fit and so order, and
247 when the City shall at any time order an extension as one job of as many as 12 Whiteway Standards installed, separated approximately the same distance as the Whiteway Standards hereinabove provided for, that the Company will install them and the City will pay for each light so installed an additional sum of $2.50 per month.

The City agrees to pay to the Company the sum of $1.75 per month for each additional 100 candle power light installed by the Company in excess of the One Hundred Fifty (150) 100 candle power lights shown on Exhibit "A" up to Six Hundred (600) 100 candle power lights, and $2.25 per 100 candle power light for each additional 100 candle power light installed in excess of the said Six Hundred (600) 100 candleper lights above mentioned.

In addition to the street lights to be installed as shown on Exhibit "A" the City may order additional extensions and installation of the street lighting system as follows:

(a) In case the City desires to have the Whiteway System extended it may by resolution, duly passed, and delivered to the Company, order an extension or extensions of the Whiteway System by agreeing and directing such resolution the fact that the City obligates itself to take one (1) 250 candle power light for each extension of approximately One Hundred Forty (140) feet, provided, however, that the Company shall not be required to construct any type of Standard other than that installed under the terms of this contract, except by special agreement of the parties hereto.

(b) The City may, by resolution duly passed, and delivered to the Company, order an extension or extensions of the bracket type lights by agreeing and reciting in such resolution the fact that the City obligates itself to take One (1) 100 candle power light for each block of such extension, provided, however, that the Company shall not be required to construct any type of bracket light other than that installed under the terms of this contract, except by
248 special agreement of the parties.

(c) In case the City desires to have the bracket type street lighting system extended more than one block without installing additional lights, as aforesaid, then in that case the City shall have the right to order such extension by paying for the actual cost of construction; and in event of such construction at the expense of the City the Company shall repay to the City in services supplied to the City for its street lighting system on such extension One-Half (½) of the monthly bills for such service on such extension until the City has been fully reimbursed for all money paid out by it on account of any such extension.

5. Payments—From the date of the execution of this

contract the City shall pay for all lights now in operation and all lights to be hereafter installed at the new rates above provided for.

If the Company shall fail to keep any light burning for as many as three consecutive nights in any one month then the proportionate part of the remuneration to be paid for such light or lights which may be kept burning, shall be deducted from the amount to be paid to the Company by the City for that month.

The Company agrees to furnish continuous service as hereinabove provided for except in cases where the Company may be prevented by strikes, fires, accidents to plant or machinery, poles or lines, beyond its control, and acts of God, provided, however, in cases where the Company may be prevented by strikes, fires, accidents to plants or machinery, poles or lines, beyond its control, acts of God, the Company will use all diligence in repairing the same so that service will not be interrupted any longer than necessary, and to make use of all facilities available to them including power from the high lines under the Company's control from other points.

Division Three of Contract

Combined Light and Power Services

1. City Hall, Auditorium, Etc.—The Company agrees to furnish electric energy for light in the City Hall,
249 City Auditorium, and at all other places owned and controlled by the City within the City, and electric energy for power for operating fans in the City Auditorium, and pumping City Sewage, and for all necessary use by the City, at the following schedule of rates and charges:

Four (4) Cents per KWH for the first Five Thousand (5,000) kilowatt hours per month.

Three and One-Half (3½) Cents per KWH for the second Five Thousand (5,000) kilowatt hours per month.

Three (3) Cents per KWH for the third Five Thousand (5,000) kilowatt hours per month.

Two and One-Half (2½) Cents per KWH for the next Twenty-Five Thousand (25,000) kilowatt hours per month.

Two (2) Cents per KWH for the balance of all kilowatt hours per month.

Provided, that an amount equal to $1.00 per each horse power of any motor of the City that was connected to the Company's line during the preceding month may be made and shall be known as the minimum charge.

Note: The schedule of rates and charges above set out is what is known as the Company's Development Rate, and it is agreed that the minimum charge of $1.00 per horse power in the above schedule is not to be applied to the motors used in the City Auditorium and the sewage.

Division Four of Contract

General Provision

1. Payments for Services—The City shall pay the Company the prices above set out for all of the services received from the Company under the terms of this Contract on the First day of each month, and at all events prior to the Tenth day of the succeeding month after the services have been rendered, and should it become necessary for the City to issue warrants for the payment of any sum or sums becoming due to the Company for any services rendered under this contract, then such warrants shall provide for and bear interest, from their date until paid, at the rate
250 of Six (6) per cent per annum.

2. Term of Contract—Unless terminated by the City, at its election, at the end of the first Ten (10) year period hereunder, in the manner and upon the conditions hereinafter set out, this contract shall run for the full period of Twenty (20) years from and after the date of execution hereof.

(a) The City reserves the right to cancel, change or modify this contract at the end of Ten (10) years from date of execution hereof upon a fair, just and equitable basis to the Company and the City, with the understanding that in arriving at a fair, just and equitable basis of readjustment or settlement the fact that the schedules of rates and charges, herein set out, are based upon a Twenty (20) year contract, shall be taken into consideration. (Rider "A" hereto attached) Provided, however, the Company will not be given any benefit in such readjustment or settlement of any prospective profit which might accrue to the Company during the remainder of such twenty year period

because of any reduced cost or prospective reduction of cost in the production of electrical energy or in the pumping of such water because of any decrease in fuel cost, it being intended that the fact that "the schedule of the rates and charges herein set out are based upon a twenty year contract shall be taken into consideration" for the purpose of protecting the Company only against loss or damage on account of property installed and cost of installation.

(b) City to Elect, When—The City shall elect to cancel, change, modify or readjust this contract by resolution of the Council adopted not more than 18 months nor less than Sixty (60) days prior to the expiration of the first Ten (10) year period, and cause a copy of such resolution to be delivered to the Company Thirty (30) days prior to the expiration of said first Ten (10) year period, setting forth in such resolution the changes, modifications or re-
251 adjustments desired, or setting forth the fact that the City desires to cancel this contract, fixing a date for a conference with the Company for the purpose of arriving at a fair, just and equitable basis of cancellation, change, modification or readjustment by agreement of the parties.

(c) If the City and Company should fail to reach an agreement at said conference, then and in that event all matters subject to arbitration hereunder and specified in such resolution of the City as aforesaid shall be submitted to arbitration. In case the City desires to arbitrate any matters not agreed upon at said conference it shall adopt a resolution within Sixty (60) days after the date set for such conference, asking for such arbitration unless the time be extended by agreement of the parties, it being expressly understood that all property installed by the Company during the life of this contract shall remain the property of the Company unless acquired by the City by agreement of the parties or by the decision of the Board of Arbitration.

(d) Board of Arbitration Selected, When and How—In case it shall be necessary to submit any matter or matters to arbitration, as herein agreed upon, then and in that event, an Arbitrator or Board of Arbitrators shall be selected as follows:

The City Council shall find and declare by resolution that the City and the Company have been unable to agree on the

terms of readjustment and-or terms, conditions and compensation of cancellation and authorize the Mayor to act for the City in the selection of a Board of Arbitration in all matters which may be submitted to arbitration at the end of the First Ten (10) year period under the terms of this contract. The Mayor shall select and name one (1) arbitrator, and notify the Company of his selection in writing, giving the name of the arbitrator selected by the City. If the selection made by the Mayor is satisfactory to the Company then the person so selected by the Mayor
252 shall act as Arbitrator and all matters hereinabove referred to as being subject to arbitration by a Board of Arbitrators shall be submitted to the person so selected as sole Arbitrator of all matters submitted to him for arbitration, it being understood that any person selected as an Arbitrator shall not act as the advocate or representative of either the City or the Company, but shall act as an impartial referee and hear the testimony or evidence offered by the parties hereto and base his decision, findings and report thereon.

If the Company fails to approve the person so selected by the Mayor then the Company shall select an Arbitrator and the two so selected shall select a third Arbitrator, and the three so selected shall constitute the Board of Arbitration.

No person shall be selected as an Arbitrator who is a resident of the City of Plainview, or who is in the employ of a municipality or private company as an operating or supervising engineer of water or electric utilities at the time of his selection under this contract.

One-Half (½) of the cost of said arbitration shall be paid by the City and One-Half (½) by the Company.

(e) Matters Submitted to Arbitration, How—If the City and the Company are unable to agree as to what would be a fair, just and equitable basis of settlement of matters subject to arbitration hereunder at the end of the first Ten (10) year period, then and in that event, the Board of Arbitration to be selected as hereinabove set out, shall proceed to set a time and place for a public hearing at the City Hall in the City of Plainview after not less than Thirty (30) days notice to the City and the Company, upon the matters submitted for arbitration for the purpose of arriving at

and fixing the just compensation to be paid by the City and
received by the Company upon cancellation of this
253 contract by the City as above set out, and-or to be
paid by the City and received by the Company as
just compensation in case the City should elect to change or modify the terms and provisions of this contract in respect to facilities or services herein agreed upon.

Within a reasonable time the Board of Arbitration shall by order, fix and certify to the Clerk of the City and to the Company the just Compensation to cover the changes and damages sustained by the Company on account of cancellation of contract, or on account of changes, modifications or readjustments desired by the City at the end of the said first Ten (10) year period. (Rider attached E. 1. Fuel Clause.)

10. Fuel Clause—It is agreed that the price for pumping water under this contract has been arbitrarily fixed by agreement of the parties. It is further agreed that boiler room fuel costs, as set out in this clause, is based upon the present operating conditions, and any readjustment of the schedules of rates and charges for water pumping based upon this fuel clause, shall be made on the basis of the comparative costs as herein agreed upon, to-wit:

The present average cost of fuel to Texas Utilities Company per K. W. H. delivered to its consumers is three-quarters of a cent (¾c) per K. W. H., and on this basis the Company will apply the following adjustments to the water pumping rates at the times and in the manner herein agreed upon, provided always that there is any such substantial or material change or changes in fuel costs to the Company to justify such readjustment, to-wit:

For every One (1) Mill reduction in the average fuel cost to Texas Utilities Company per K.W.H. delivered to its consumers the Company will reduce the water pumping rates set out in this contract One and One-Half (1½) Mills per One Thousand (1,000) Gallons of water pumped.

For every One (1) Mill increase in the average cost of
fuel to Texas Utilities Company per K. W. H. de-
254 livered to its consumers the Company will increase
the water pumping rates set out in this contract
One and One-Half (1½) Mills per One Thousand (1,000) Gallons of water pumped.

This City may, at its option, call for readjustment of rates under this clause at and when it may see fit.

(f) Notices—All notices, orders and resolutions herein provided for shall be considered as having been duly given to the Company when any such may be given to the person at the time in charge of either the Company's office or the Company's Plant in the City of Plainview, Texas.

This contract is executed in triplicate originals at Plainview, Texas, where this contract is performable in all its terms, this the day and year herein first written, and it is agreed that this contract contains all the covenants and agreements made by and between the parties hereto on the subject matter hereof, and that no part of this contract shall be in any manner amended or abrogated, superceded or altered, unless done in writing and signed by the parties hereto acting by and through their duly authorized agents.

One copy of this contract is delivered to the City Secretary of Plainview, Texas, for the use and as the property of the City, and one copy hereof is delivered to the President of Texas Utilities Company, and one copy to the Secretary of Texas Utilities Company, for the use and as the property of said Company, and each of the parties hereto hereby acknowledge receipt of a copy hereof.

In Testimony Whereof the said City of Plainview has caused these presents to be executed in its corporate name by its said Mayor and City Council and its corporate seal to be hereto affixed by its City Secretary in the City of Plainview, this the day and year herein first written.

In Testimony Whereof the said Texas Utilities Company has caused these presents to be executed in its corporate name by its president and its corporate seal to be hereto affixed at its office in the City of Plainview, this the day and year in this contract first written.

255 CITY OF PLAINVIEW, TEXAS,
By W. E. RISSER, *Mayor.*
ATTEST: G. H. SAIGLING,
City Secretary.

(Seal)

TEXAS UTILITIES COMPANY,
By I. R. KELSO, *President.*
ATTEST: J. B. SCOTT, *Secretary.*

(Seal)

THE STATE OF TEXAS,
County of Hale:

I, George H. Saigling, City Secretary of the City of Plainview, Texas, do hereby certify that the above and foregoing instrument of writing consisting of 20 pages, is a true and correct copy of the proceedings of the City Council of the City of Plainview, Texas, for the purpose of considering and acting upon a certain contract between said City and the Texas Utilities Company, a corporation, and authorizing the execution of said contract by and through its Mayor, W. E. Risser, and its City Secretary George H. Saigling.

I further certify that the above and foregoing contract set out as a part of the minutes of the Regular Meeting of the City Council convened and called in special session, at the call of the Mayor of the City, at the City Hall in said town, for the purpose of considering and authorizing the execution of said contract, on the 7th day of March, A. D. 1927, is true and correct copy of said contract as executed in final form by the City of Plainview and Texas Utilities Company.

I further certify that I am the duly elected and qualified and acting Secretary of said City of Plainview, and the following named persons were officers of said City, to-wit: W. E. Risser, Mayor. J. C. Hooper, J. L. Guest, D. M. Thompson, W. E. Boyd and J. B. Cardwell, being all of the Councilmen of said City.

256 I further certify that the Mayor and all of the members of said council were present at said meeting and voted in favor of accepting said contract, and in favor of authorizing the Mayor and City Secretary to execute said contract in the name and on behalf of said City of Plainview.

Done at my office in Plainview, Texas, this the 7th day of March, A. D., 1927.

G. H. SAIGLING, *City Secretary.*

(Seal)

257 *Exhibit D.*

P. W. A. Docket No. 8021

1. Purpose of Agreement. Subject to the terms and conditions of this Agreement, the United States of America (herein called the "Government") will, by loan and grant not exceeding in the aggregate the sum of $423,346 (herein called the "Allotment") aid the City of Plainview, Hale County, Texas (herein called the "Borrower") in financing a project (herein called the "Project") consisting substantially of a Diesel electric generating plant and distribution system, including street lighting (the Project together with all improvements and extensions thereto and replacements thereof subsequently constructed or acquired being herein called the "System"); all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 8021, Title II, of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of Texas (herein called the "State").

2. Amount and Method of Making Loan. The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $328,000 aggregate principal amount of coupon bonds (herein called the "Bonds") of the description outlined below or such other description as may be satisfactory to the Borrower and to the Federal Emergency Administrator of Public Works (herein called the "Administrator"), bearing interest at the rate of 4 percent per annum, payable semiannually from date until maturity and bearing covenants as to transferability satisfactory to the Administrator, less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) Date.—June 1, 1935.

(b) Denomination.—$1,000.

(c) Place of Payment.—At the office of the City Treasurer in the City of Plainview, Hale County, Texas; or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York.

258 (d) Registration Privileges. At the option of the holder as to principal only.

(e) Maturities. Payable, without option of prior redemption, on June 1, in years and amounts as follows:

1937	$10,000
1938	15,000
1939 to 1942, inclusive	20,000
1943 to 1946, inclusive	25,000
1947 to 1949, inclusive	30,000
1950	33,000

(f) Security. Special obligations of the Borrower payable as to both principal and interest from and secured by an exclusive first lien on and pledge of the entire revenues of the System, after deduction only of reasonable operation and maintenance expenses, and additionally secured by a first-lien mortgage on the real estate and chattel property described in said mortgage constituting said System.

3. Amount and Method of Making Grant. The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The determination by the Administrator of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons, or both. If all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $114,000.

4. Bond Proceedings. When the Agreement has been executed the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. Bond and Grant Requisitions. From time to time after the execution of this Agreement the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by

the Administrator (a requisition together with such documents being herein collectively called a "Requisi-
259 tion").

6. Bond Payments. If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator, or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which, in the judgment of the Administrator, is needed by the Borrower to complete the Project.

7. Grant by Payment of Money. If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined.

Provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government re-

serves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the
260 Project.

8. Grant by Cancellation of Bonds. If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. Grant Advances. At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts. The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8 hereof into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7 hereof promptly upon the receipt of such proceeds or payments in a separate ac-

count or accounts (each of such separate accounts herein called a "Construction Account") in a bank or banks which are members of the Federal Reserve System and of
261 the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

11. Disbursement of Monies in Construction Accounts and in Bond Fund.—The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and as shall have been approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be canceled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

12. Other Financial Aid from the Government. If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

13. Construction of Project. Not later than upon the receipt by it of the first Bond payment, the Borrower will commence, or cause to be commenced, the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications, and construction contracts which shall be satisfactory to the

Administrator, and under such engineering supervision and inspection as the Administrator may require. Ex-
262 cept with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement.

14. Construction Work. All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. By the act of executing this Agreement the Borrower acknowledges receipt of a copy of the rules and regulations set out in Bulletin No. 2, Non-Federal Projects revised March 1, 1935, entitled "P. W. A. Requirements as to Bids, Contractors' Bonds, and Contract, Wage and Labor Provisions and General Instructions as to Applications and Loans and Grants," and covenants that said rules and regulations, with all blank spaces filled in as provided in said Bulletin, will be incorporated verbatim in all construction contracts for work on the Project.[1]

15. Force Account. All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force-account basis.

16. Restriction as to Contractors. The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

17. Bonds and Insurance. Construction contracts shall be supported by adequate surety or other bonds or
263 security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project, or any part thereof. The contractor under any construction contract shall be required to provide public-liability insurance in an amount satisfactory to the Administrator.

[1] Particular care should be taken by the Borrower that in all construction contracts the following words are inserted in the blank space in Paragraph 3 (a) (1) of the rules and regulations: CITY OF PLAINVIEW and/or COUNTY OF HALE and the following words are inserted in the blank space in Paragraph 3 (a) (2) of the rules and regulations: State of Texas.

18. Information. During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost, and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonably require.

19. Representations and Warranties. The Borrower represents and warrants as follows:

(a) Litigation. No litigation or other proceedings are now pending or threatened which might adversely affect the Bonds, the security therefor, the construction of the Project, or the financial condition of the Borrower;

(b) Financial Condition. The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such changes as are necessary and incidental to the ordinary and and usual conduct of the Borrower's affairs;

(c) Fees and Commissions.—It has not and does not intend to pay any bonus, fee, or commission in order to secure the loan or grant hereunder;

(d) Affirmation. Every statement contained in this Agreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

20. Bond Circular. The Borrower will furnish all such information in proper form for the preparation of a Bond Circular and will take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per centum of the Bonds may reasonably request to aid in the sale by the Government or such purchaser or purchasers of any or all of the Bonds.

21. Expenses. The Government shall be under no obliga-

tion to pay any costs, charges, or expenses incident to
264 compliance with any of the duties or obligations of the Borrower under this Agreement, including, without limiting the generality of the foregoing, the cost of preparing, executing, and delivering the Bonds, and any legal, engineering, and accounting costs, charges, or expenses incurred by the Borrower.

22. Waiver. Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

23. Interest of Member of Congress. No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

24. Validation. The Borrower hereby covenants that it will institute, prosecute, and carry to completion insofar as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issues of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder a letter from the Governor of the State stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

25. Naming of Project. The Project shall never be
265 named except with the written consent of the Administrator.

26. Insurance on Project. The Borrower shall, during the life of the Project, maintain proper and adequate insurance thereon.

27. Undue Delay by the Borrower. If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

28. Conditions Precedent to the Government's Obligations. The Government shall be under no obligation to pay for any of the Bonds or to make any part of the Grant:

(a) Financial Condition and Budget. If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) Cost of Project. If the Administrator shall not be satisfied that the Borrower will be able to complete the Project for the sum of $423,346, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) Compliance. If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) Legal Matters. If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the construction of the Project;

(e) Representations. If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower, shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) Maturity of Bonds Sold to Government. If, in the event that some of the Bonds are sold to purchasers other than the Government, the maturities of the remaining Bonds are not satisfactory to the Administrator;

(g) Bond Ordinance. If the ordinance authorizing the issuance and sale of the Bonds shall not be satisfactory to the Administrator;

(h) Rate Ordinance. If the Borrower shall not adopt an ordinance or ordinances setting forth an initial rate schedule satisfactory to the Administrator and providing that the Borrower will use the revenues of the electric generating and distribution system for no purposes other than for debt service on the Bonds, operating expenses and maintenance, a reserve which shall not exceed three years' debt service next due, and, to the extent that revenues are available after such uses, for necessary extension; and if such ordinance or ordinances shall not provide that the Borrower will make reasonable charges for all current used for street-lighting and other municipal purposes, and that said charges will not be less than the cost of producing and distributing said current;

(i) Mortgage. If the mortgage, referred to in
266 Paragraph 2(f), herein, and the deed of trust shall not be satisfactory to the Administrator as to form, sufficiency, and substance;

(j) If the borrower shall not furnish evidence satisfactory to the Administrator that the Texas Utilities Company can be legally required to furnish electrical service on a day-to-day basis to present customers until the borrower shall have completed the project.

29. Accounts and Statements. So long as any of the Bonds are held by the Government, the Borrower will furnish to the Government, not later than 30 days after the close of each six months' fiscal period, complete operating and income statements of the System in reasonable detail covering such six months' period, and, not more than 60 days after the close of each fiscal year, complete financial statements of the System and the Borrower covering such fiscal year, certified by independent auditors.

This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This Agreement shall be governed by and be construed in accordance with the laws of the State. If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity

and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto; provided, however, that in the opinion of the Administrator, the Agreement does not then violate the terms of the Act.

In Witness Whereof, the Borrower and the Government have respectively caused this Agreement to be duly executed as of August 17, 1935.

CITY OF PLAINVIEW,
HALE COUNTY, TEXAS,
By TOM SHELTON, Mayor.

(Seal.)
Attest:
J. L. GALLOWAY,
City Secretary.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS,

By E. W. CLARK,
For the Assistant Administrator.

267 EXHIBIT E

P. W. A. Docket No. 8021

Agreement Dated as of Nov. 18, 1935, Terminating the Loan and Grant Agreement Dated as of August 17, 1935, Between the City of Plainview, Hale County, Texas (Herein Called the "City") and the United States of America, (Herein Called the "Government")

Whereas a Loan and Grant Agreement was entered into by and between the City and the Government dated as of August 17, 1935; and

Whereas it is to the mutual advantage of the City and the Government to terminate said Loan and Grant Agreement.

Now, Therefore, it is Hereby Agreed by and between the City and the Government that said Loan and Grant Agreement, dated as of August 17, 1935, be, and the same hereby is, terminated.

CITY OF PLAINVIEW, (HALE COUNTY, TEXAS)
By TOM SHELTON, Mayor.
(SEAL)

(Seal.)
Attest:
J. L. GALLOWAY,
Secretary.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS,

By H. B. HACKETT,
Assistant Administrator.

268 EXHIBIT F.

Federal Emergency Administration of
Public Works,

Washington, D. C., December 4, 1935.

CITY OF PLAINVIEW,
Hale County, Texas.

1. Offer. The United States of America (herein called the "Government") hereby offers to aid in financing the construction of a Diesel electric generating plant and distribution system, including street lighting (herein called the "Project"), by making a loan and grant to the City of Plainview (herein called the "Applicant") not exceeding in the aggregate the sum of $423,346.

2. Method of Making Loan. The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $328,000, less such amount of such obligations, if any, as the Applicant may sell to purchacers other than the Government:

(a) Obligor. City of Plainview;

(b) Type. Special obligation electric revenue coupon bond;

(c) Denomination. $1,000;

(d) Date. June 1, 1935;

(e) Interest Rate and Interest Payment Dates.—4 per cent per annum, payable semiannually on June 1 and December 1;

(f) Place of Payment.—At the office of the City Treasurer in the City of Plainview, Texas; or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York;

(g) Registration Privileges.—Registerable at the option of the holder as to principal only;

(h) Maturities. Payable, without option of prior redemption, on June 1 in years and amounts as follows:

Year:	Amount
1937	$10,000
1938	15,000
1939-1942 (both inclusive)	20,000
1943-1946 (both inclusive)	25,000
1947-1949 (both inclusive)	30,000
1950	33,000

(i) Security. Payable as to both principal and interest from and secured by an exclusive first lien on and pledge of the entire revenues of the System (which "System" includes the "Project", together with all improvements and extensions thereto and replacements thereof subsequently constructed or acquired), after deduction only of reasonable operation and maintenance expenses, and additionally secured by a first-lien mortgage on the real estate and chattel property described in said mortgage constituting said System.

3. Amount of Grant.—The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Gov-
269 ernment will make the grant either wholly by the payment of money or partly by the payment of money and partly by the cancellation of obligations purchased pursuant to this offer or interest coupons attached thereto, in aggregate amount equal to the amount of the grant less the amount in money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $114,000.

4. Conditions Precedent. The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant;

(a) Financial Condition. If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) Cost of Project. If it appears that the Applicant will not be able to complete the Project described in this offer for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) Plans and Specifications and Certificate of Purposes. If the Applicant shall not have filed with the Government plans and specifications for the Project, accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. Interest of Member of Congress. No Member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. Bonus or Commission. The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. Information. The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. Bond Circular. The Applicant shall furnish all
270 such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Gov-

ernment of not less than 25 per cent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. Insurance.—The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. Name of Project. The Applicant shall not name the Project for any living person.

11. Grant and Bond Payments.—

(a) Advance Grant. Upon receipt of this offer, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings and other preliminary investigations, cost of preparation of plans, specifications and other forms of proposed contract documents, and costs of advertisements for bids for contracts and the printing of the bonds, but not in payment for the acquisition of lands, easements, or rights-of-way. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) Payment for Bonds. A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the bond transcript and other documents supporting such requisitions are complete;

(c) Intermediate Grant Requisitions. Simultaneously with the delivery and of payment for the bonds by the Government, or when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference

between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 30 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this offer relating thereto;

(d) Final Grant Payment. At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all
271 previous payments on account of such grant, shall be an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this offer relating thereto;

(e) Construction Account.—A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant, the intermediate grants, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), the final grant, and any other moneys which shall be required in addition to the foregoing, to pay the cost of constructing the Project shall be deposited in the Construction Account, promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account;

(f) Disbursement of Moneys in Construction Account.—Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase bonds, if any of the bonds are then held by the Government, or be transferred to the Bond Fund;

(g) Use of Moneys in Bond Fund. Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of bonds.

12. Construction of Project. The following policies have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth shall be subject to the condition that the Applicant, in the exercise of its lawful discretion, shall adopt said policies and comply therewith in the construction of the Project:

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder, pursuant to public advertisement, and that every opportunity be given for free, open, and competitive bidding for contracts for construction and contracts for the purchase of materials and equipment;

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open, and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function the term "or equal" is to be literally construed so that any material or article which will perform adequatey the duties imposed by the general design will be considered satisfactory;

(c) That in determining the lowest bidder for the supplying of materials and equipment in the interest of standardization or ultimate economy the contract may be awarded to other than the actual lowest bidder;

(d) That, in order to insure completion of a project with-

in the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk, and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of such project, except in cases in which it
272 is required by the laws of Texas that protection for labor and material-men be provided by a bond separate from the performance bond. In such latter case a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate;

(e) That if the work on any proposed construction contract is hazardous, the contractor will be required to provide public-liability insurance and property-damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor;

(f) That minimum or other wage rates required to be predetermined by the law of Texas or local ordinance shall be predetermined by the applicant in accordance therewith and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance the applicant shall predetermine minimum-wage rates in accordance with customary local rates for all the trades and occupations to be employed on the project and incorporate them in the appropriate contract documents;

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner;

(h) That a project will be constructed in accordance with the provisions of the attached Exhibit A, which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof may if the applicant so desires, be inserted verbatim in such construction contract or contracts.)

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Texas and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

By HORATIO B. HACKETT,
Assistant Administrator.

273 *Exhibit F-2*

PW-L-56
11-26-35

P. W. 45561

Exhibit "A"

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below

not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of ..... to be paid by employee, in these cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deduction therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked

by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'" 274

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) ....*Provided,* That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor, similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, ... for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less
275 than $..... for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

. . . . . .

. . . . . .

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials or supplies:

On purchases where the foreign bid is $100 or
276 less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.* The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly report is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payment.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar

month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs.*—The contractor shall furnish signs bearing the legend:

277 *"Federal Public Works Project No....."*

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4 inclusive, 6, 8 to 13 inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease, and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately

serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director, P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirements shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for
278 housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof,

the following proviso shall be added at the end of paragraph 1(b):

And provided further. It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1 (b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

Section 1. Said Act reads as follows:

"To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

"*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment,

by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor or subcontractor
279 shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

Section 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County of....., ss:

I, ... (name the party signing affidavit) .....(Title), do hereby certify that I am (the employee of).....(name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of .....(project), for the weekly pay roll period from the ..... day of ....., 193.... to the ..... day of ....., 193..., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates

in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ..... 193....

Section 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

Section 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement
280 under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

Section 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

Section 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

Whereupon there was received in evidence as
281 Plaintiff's Exhibit 25-A the application of the City of Plainview, Texas, to the Federal Emergency Administrator of Public Works for a loan and grant.

Plaintiff's Exhibit 25-A

The City of Plainview,

of Plainview, Hale County, Texas, hereby makes application to the Federal Emergency Administrator of Public Works, National recovery Act of 1933, for a loan of Two Hundred Ninety-Six Thousand Three Hundred Forty-Six Dollars and Four Cents ($296,346.04).

And grant of One Hundred Twenty-Seven Thousand Dollars ($127,000.00) for the construction of a Municipal Light and Power Plant, and Complete Distribution System for the City of Plainview.

* * * * * * * *

The applicant understands and agrees that in case a loan is granted, suitable contracts will be awarded, subject to the approval of the Administrator for the project involved.

The applicant further agrees that the purposes and policies of the Act and the rules and regulations adopted in respect thereto will be observed and complied with and that such contracts, obligations and encumbrances as may be required to secure the loan in compliance with law will be duly prepared and executed, and that such corporate proceedings as may be required to authorize such execution will be passed and adopted according to law.

* * * * * * * *

CITY OF PLAINVIEW TEXAS *Applicant.*

By R. P. SMYTH,
Mayor.

Extract of Minutes of Proceedings City Council Plainview, Texas.

At a regular meeting of the City Council of the City of Plainview held in the City Hall of said City on the 7th day of August A. D. 1933.

282 Mayor R. P. Smyth presiding and all the Aldermen of said, city being present: to-wit: Aldermen H. Dysart; E. M. Osborne; F. J. Hurlbut; J. B. Long and J. B. Wallace. Among the proceedings acted upon, it was moved by Alderman Hurlbut and seconded by Alderman Osborne that Colonel R. P. Smyth, Mayor of the

City of Plainview, is authorized to make application to the Federal Emergency Administrator of Public Works under the National Industrial Recovery Act of Congress of 1933 for a loan not to exceed Four Hundred and Fifty Thousand Dollars, ($450,000.00) or as much as may be necessary less whatever amount or grant may be allowed by said Administrator of Public Works, and said loan to be secured by an issue of electric light revenue bonds authorized by a vote of the people April 4th, 1933. The moneys so borrowed and granted to be used in the constructing and completion of an electric light and power system for the City of Plainview. Said system to consist of a generating plant and distribution system sufficient for needs of the City; and to do all things necessary, required or proper to be done for the purpose of procuring such loan and grant and to make all representations and all promises necessary, required or proper to be made for such purposes. Said system to be contracted under forms of contractual documents meeting the approval of the said Administrator as to labor, wages, working hours and all other matters as administrated by the Federal Administrator and his agents.

Said motion carried by a unanimous vote of all Aldermen present.

R. P. SMYTH,
Mayor.

Attest
J. L. GALLAWAY,
Secretary.

* * * * * * * *

III. *The Loan Requested.*

(a) Amount, Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents,
283 ($423,346.04).

(b) The security offered is Revenue Bonds of the Light and Power Plant.

(c) *Period of Loan.*

Twenty (20) years, we will pay the interest annually and the principal semi-annually as follows, in forty equal payments with the right to retire any part or all of the debt after five years.

(d) The applicant prefers to sell to the United States its bonds for the entire amount of Four Hundred Twenty-Three Thousand Three Hundred Forty-Six Dollars and Four Cents ($423,346.04). We wish to apply for 30% grant under the following conditions. The applicant sell to the United States its bonds for 100% of the cost of the job and defer payments of interest and principal until such deferred payments total the amount of the grant.

* * * * * * * * *

IV. *The Project.*

(a) The Municipality desires to erect an Electric Light and Power Plant sufficiently large to take care of the needs of the City and also to build a complete distribution system within the City.

(b) Consulting Engineers' plans and specifications are attached hereto, "Exhibit IV.A".

(c) Engineers' Report.

New Electric Light & Power System

Power Plant Site: It is desirable to have the power generating units located as closely to the center of the load as circumstances will permit. The City's water tower lot in Block 17, original townsite is an ideal location. It is near the center of load and is already served by a switch track. Engines of the type contemplated will be provided with suitable mufflers and will not be objectionable to surrounding establishments.

Power Equipment

284 It is realized, that with two electric service systems, the total capacity of power equipment needed to serve all of the City of Plainview will not be required for either one of the plants, but will be divided between the two. The writers have assumed, as a basis for this estimate, that the City's system will be called upon within a reasonable period to supply from one-half to three-fourths of the power needed. Accordingly it is proposed to install three 750 HP Diesel engine generator units with necessary auxiliaries. This will provide two units for carrying the peak load with a third in reserve. It will be noted that the three units are

all of the same size. Spare parts will be interchangable resulting in a minimum investment in spare parts.

* * * * * * * *

A design of the layout of the distribution system must of necessity take into consideration the location of the present system. Wherever the lines of the present system or of the telephone company must be crossed the proper clearance must be provided. Insofar as practical, the lines have been placed in the alleys.

It should be kept in mind, that the present system and the telephone company have preempted the best locations for poles and wires and the designer of a new system is compelled to take what is left. This occasionally results in the choice of an inferior location which cannot be avoided. However, at all points of interference ample clearance for safety of operation of all three systems is provided.

* * * * * * * *

Relation Between Privately Owned and Municipal Systems:

Should the City of Plainview build a new electric service system, it must then operate in competition to the present system. Under such circumstances, as pointed out heretofore, the total demand for electric service would be divided between the two, calling for a little more than one-half of the power equipment needed if only one system were to serve the City.

At the same time the distribution system must
285 practically cover the entire city, so as to furnish electric service for domestic or industrial use as desired.

These facts were kept in mind in the design of the new system.

The average annual gross return for residential lighting is some $28.00 per connection. For combined residential lighting or range service the average annual gross return is $80.00 to $100.00.

For mercantile lighting the average annual gross return is $45.00 to $50.00.

For small power consumption the average gross annual return is some $25.00 per horse power.

These are average figures and will vary somewhat for each particular City.

It is reasonable to assume under the present depressed conditions the following connections and total annual gross income for both systems:

1448 HP in Small Motors @ $25.00 per year	$ 36,200.00
787 Small Residences @ $25.00 per year	44,675.00
185 Large Residences @ $60.00 per year	11,100.00
63 Combined Light & Ranges @ $90.00 per year	5,670.00
164 Small Commercial Connections @ $45.00 per year	7,380.00
111 Large Commercial Connections @ $120.00 per year	13,200.00
Flour Mill	17,288.00
Hotel	3,600.00
Total Gross Revenue for Both Plants	$139,113.00

It is estimated that the City should, at the very beginning, receive an average of 60% of this amounting to
286 $83,467.00.

Under normal business conditions, and without any growth to the City, the annual gross revenue should be increased from 20% to 30%. Five years hence the annual gross revenue should exceed $170,000.00. Located as Plainview is, in the heart of the fast growing and progressive West Texas, a normal growth may be excepted. Accordingly ten years hence, the annual gross income should approach $200,000.00 and later it should exceed that sum.

On a 60% basis the City should receive the following gross annual revenue from the light plant:

At the beginning	$ 83,000.00
The 6th year	100,000.00
The 11th year	112,000.00
The 17th year	120,000.00

There is no reason why the operation of both the water and light plants cannot be under one management. As a matter of fact where such utilities are owned by the same concern it has been found most efficient and practical to

have one manager for both of them. Under such assumptions the cost of operation of the two utilities should be less than if they were independently managed. For instance, it is contemplated that the present City Hall facilities can handle the manager's office, meter readings, collections, etc., without any particular increase in cost. It is true that a rearrangement may be necessary, and perhaps the adoption of more efficient methods and devices, and the discarding of antiquated ideas and methods. If such is necessary no difficulty is anticipated in the accomplishment.

Accordingly the writers estimate that under such circumstances the annual cost of operation should not exceed $30,000.00 for the first five years, $35,000.00 for the next five years.

The following table is based upon a 17 year amortization period for an issuance of 6%, serial, bonds in the amount of $400,000.00, and includes the anticipated annual
287 gross income, operating expense, interest, principal payment, surplus and accumulated surplus.

This table is presented for the purpose of illustration to show what can be done. If and when a contract is let for the construction of a municipal electric light and power system, the exact schedule of payments will be established.

Amortization Schedule for Issuance of 6%, Serial Revenue Bonds in the Amount of $400,000.00

Year	Gross Income	Operation Expenses	Interest	Principal Payment	Surplus	Accumulated Surplus
1st.	$83,000	$30,000	$24,000	None	$29,000	$29,000
2nd.	83,000	30,000	24,000	None	29,000	58,000
3rd.	90,000	30,000	24,000	$15,000	21,000	79,000
4th.	95,000	30,000	23,100	17,000	25,000	104,000
5th.	97,000	30,000	22,080	18,000	26,920	130,920
6th.	100,000	35,000	21,000	20,000	24,000	154,000
7th.	104,000	35,000	19,800	20,000	29,200	184,120
8th.	106,000	35,000	18,600	22,000	30,400	214,520
9th.	108,000	35,000	17,280	23,000	32,720	247,240
10th.	110,000	35,000	15,900	27,000	32,100	279,340
11th.	112,000	40,000	14,280	28,000	29,720	309,060
12th.	112,000	40,000	12,600	29,000	30,400	339,460
13th.	113,000	40,000	10,860	32,000	30,140	369,600
14th.	115,000	40,000	8,960	34,000	32,060	401,660
15th.	116,000	40,000	6,900	36,000	33,100	434,760
16th.	118,000	45,000	4,740	39,000	29,260	464,020
17th.	120,000	45,000	2,400	40,000	32,600	496,620

In order to be conservative the writers based the gross annual income for the City on the assumption that the City would receive only 60% of the business. It is seen from the above table that even on such an assumption the City would accumulate a surplus of some $500,000.00 during the 17 year amortization period. Interest on the surplus was not considered for the reason that the City would and should use at least a portion of such money to reduce ad valorem taxes.

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Rate Schedule:

The writer feels that the citizens as a whole would profit more were the rates kept sufficiently high to enable the plant to earn a profit, which profit could be utilized in reducing ad valorem taxes. The present rates should permit a reasonable reduction of from 15% to 20%, and continue to produce an income sufficient to provide a surplus over operating expenses and fixed charges.

With this in mind the following tentative rate schedule is suggested:

1. *Residential Lighting And/Or Heating And/Or Cooking And/Or Refrigeration:*

First 10 KWH @.....10¢ per KWH.
Next 10 KWH @.....8½¢ per KWH.
Next 15 KWH @.....7½¢ per KWH.
Next 15 KWH @.....7¢ per KWH.
Over 50 KWH @.....3¢ per KWH.
Minimum—$1.50 per month. (Lighting Only)
Minimum—$2.50 per month. (Combination)

2. *Business Lighting And/Or Cooking And/Or Heating And/Or Refrigeration:*

First 50 KWH @.....10¢ per KWH.
Next 100 KWH @.....8¢ per KWH.
Next 100 KWH @.....7¢ per KWH.
Next 200 KWH @.....5¢ per KWH.
Next 300 KWH @.....4½¢ per KWH.
Next 750 KWH @.....4¢ per KWH.
Over 1500 KWH @.....2½¢ per KWH.
Minimum—$1.50 per month (Lighting Only)
Minimum—$2.50 per month (Combination)

289 3. *Heating And/Or Cooking (No Lighting)*

First 750 KWH @.....4¢ per KWH.
Over 750 KWH @.....3¢ per KWH.
Minimum—$2.50 per month.

4. *Sign And/Or Window Lighting:*

First 100 KWH @.....6¢ per KWH.
Next 400 KWH @.....5¢ per KWH.
Over 500 KWH @.....4¢ per KWH.
Minimum—$1.50 per month.

5. *Power.*

Demand charge $1.00 per month per KW connected. This demand charge to entitle customers to 10 KWH use of energy per month per KW connected. Additional energy to be at following rates:

Next 60 KWH used per KW Connected @..4½ per KWH.
Next 100 KWH used per KW connected @.3½¢ per KWH.
Next 100 KWH used per KW connected @..2¢ per KWH.
Excess KWH used per KW connected @....1¢ per KWH.
Minimum—$1.25 per KW connected.

Street Light and Other Electric Service:

The City now pays the Company about $4,600.00 per year for electric service. If the City owned the street lights and White Way System a saving would be effected amounting to approximately $3,000.00 per year. This saving would pay for the White Way System within the 17 year amortization period.

Water Supply:

In the event that the City should build its own electric service system it would be desirable to own its water supply. Money for the necessary wells, pumping equipment and mains could be secured from the Reconstruction
290 Finance Corporation. The City is now paying some $9,000.00 per year for water. The savings on this item would amount to about $5,000.00 per year. This amount, capitalized at 6%, would justify the City in spending some $80,000.00 for such purpose if needed. A proper

amortization of such capital investment would enable it to be paid entirely from the savings to the city.

Estimate of Cost of New Electric Service System.

Power Plant Site, City Water Tower Lot	No Cost
Power Plant Building	$ 17,647.00
Power Equipment Complete in Place, Including Starting and Water Circulating Equipment	152,260.00
Station Piping	1,765.00
Station Wiring	1,412.00
Switchboard	6,470.00
Crane and Hoist	2,823.00
Cooling Tower and Water Softener	5,295.00
Oil Storage	1,412.00
Store room and Garage	1,765.00
Transportation Equipment	1,529.00
Office Equipment	1,176.00
Distribution System	159,520.00
Purchase of White Way System	23,529.00
SUB-TOTAL	376,603.00
Engineering & Contingencies	23,397.00
TOTAL ESTIMATED COST	$400,000.00

NOTE: The above estimate is based on paying the contractor with revenue bonds at par.

The above estimate includes the amount of $23,529.00 for the purchase of the White Way System. On the other hand the yearly saving to the City in the present cost of lights, amounting to some $3,000.00 was not taken into con-
291 sideration in working up the amortization table, and accordingly was not included in the 17-year "Accumulated Surplus".

As matter of fact, the writers feel, that since all of the operating expenses and fixed charges are to be paid from the plant revenues and "Accumulated Surplus" could be increased by such yearly saving of $3,000.00. This would give an additional amount of $51,000.00 for the 17-year period. Added to the "Accumulated Surplus" of $496,620.00 shown in the amortization table, a resulting total "Accumulated Surplus" of $547,620.00 is obtained.

(d) 1. Preliminary expenses? None
2. Cost of land? None, as the City owns the land.

3. Cost of construction?	$395,423.15
Labor	$110,721.29
Materials	$205,625.26
Contractors profits	$ 79,086.60
	$395,433.15
4. Engineering charges	$ 19,086.60
5. Legal & other overhead	$ 1,085.02
6. Interest during construction	$ 7,741.27
7. Miscellaneous	
8. Total	$423,346.04

(e) The convenience of this project is evidenced by the demand for continuous adequate service twenty-four hours in the day every day in the year. When this project is built, it will afford such convenience for every citizen within the corporation limits of the City of Plainview; also the outlying districts adjacent to the city limits. This outlying district will include 700 shallow water irrigation wells that are used for agricultural purposes. It will also provide adequate service for some of our largest industries that are being forced to supply their own electric current
292 at a cost that places their manufactured products out of line with competing plants in this section.

The necessity for such a plant is expressed in two ways. First purpose is to lower the price of electric current to the consumer in this immediate territory. The second purpose is to lower the ad valorem tax levy as now levied and collected by the City Council of the City of Plainview on the taxable valuations within the said corporate city limits.

The necessity for reduced rates may be expressed as follows:

A commercial lighting bill of 250 KWH in Plainview costs	$23.50
A commercial lighting bill of 250 KWH in Tulia costs	10.50
A commercial lighting bill of 250 KWH in Vernon costs	9.00
A commercial lighting bill of 250 KWH in Spur costs	6.60
A commercial lighting rate of 250 KWH in Greenville costs	12.00
A commercial lighting bill of 250 KWH in Lubbock costs	8.00

A firm has stores in both Plainview & Lubbock
Their bills for April, 1932:

PLAINVIEW, 192 KWH, $15.07—Av. 8.8¢ per KWH
LUBBOCK, 449 KWH, $15.22—Av. 3.2¢ per KWH

Why the difference?

Both bills are Texas Utilities Company bills

We propose a reduction of rates of an average of 20% from the present rate.

As further evidence for the necessity of reduced rates, the City of Plainview paid the Texas Utilities Company in 1931 for water pumping and street lighting $20,802.65. From these figures it is evident that the electric rates necessitate the construction and operation of a municipally owned plant as provided for in this application.

By taking the present number of electric users and
293 applying the general average consumption, as information revealed from the records of the Texas Utilities Company, it will be found that the investment in the proposed municipal plant will be returned after a period of eight or ten years. After this time the net proceeds received from the plant will be used to pay the running expenses of the city government, thus reducing the ad valorem tax levy to a very low minimum and most assuredly not more than 50% on the $100 valuation.

Remarks:

It is proposed to install a complete generating and distribution electric system covering the City of Plainview. The generating system to consist of three 750 horse-power Diesel engine and generator units with all the necessary auxiliaries, the engine to be attached directly to electric generators, excitors and other necessary equipment.

The plant will also be equipped with the necessary switch boards and panel boards of the latest type. The distribution system will consist of 110,220,440, and 2,300 volt services. The system will be constructed from the best cedar creosoted poles, copper insulated wires, thus giving one of the latest and most modern distribution systems possible to build.

The necessary transformers, meters, etc., for efficient service will be installed. The plant will be supplied with an

ample supply of pure water which will be used in a modern cooling tower to insure proper and efficient operation of engines.

Also there will be approximately 30% of the moneys spent locally for labor.

(f) Is the project a part of a larger plan or program? Yes, the City intends to do some paving and also to enlarge their sewerage disposal plant.

(g) The City does not have a Planning Board.

(h) The City is not a part of a Metropolitan dis-
294 trict.

(i) Has the project been endorsed by civic group or other similar bodies? Yes, by a special Election, the voters of the City voted to buy the present plant or build a new one by a vote about 4½ to 1.

(j) No objections have been made to this project, except by the Public Utilities Company or their employers.

(k) Will the project compete with existing enterprises? Yes.

(l) Construction plans are now ready.

(m) Construction can be started within two weeks after approval of the application.

(n) It will take nine months to complete the project.

(o) Estimated average number of men given employment is 180 men monthly, for nine months.

V. (a) The project is not an extension of any system but is entirely new.

* * * * * * * * *

(d) Present rate schedule.

Residential Lighting and/or Heating and/or Cooking and/or Refrigeration.

First	25 KWH	used per month @.....	11c per KWH
Next	25 KWH	used per month @.....	8c per KWH
Excess	KWH	used per month @.....	3c per KWH

MINIMUM—$1.50 per month (Lighting Only)
MINIMUM—$2.50 per month (Combination)

Above rate NET. 5% Penalty added if bill is not paid by 10th of month.

Business Lighting and/or Cooking and/or Heating and/or Refrigeration

First 50 KWH used per month @..... 11c per KWH
Next 200 KWH used per month @..... 9c per KWH
Next 750 KWH used per month @..... 5c per KWH
Next 1000 KWH used per month @.. 4c per KWH
295 Excess KWH used per month @.. 3c per KWH
MINIMUM—$1.50 per month (Lighting Only)
MINIMUM—$2.50 per month (Combination)

Above rate NET. 5% penalty added if bill is not paid by 10th of month.

Heating and/or Cooking and/or Refrigeration (No Lighting)

All current used per month @..... 4c per KWH
MINIMUM—$2.50 per month.

Above rate NET. 5% Penalty added if bill is not paid by 10th of month.

Sign and/or Window Lighting.

All current used per month @..... 6c per KWH
MINIMUM—$1.50 per month

Above rate NET. 5% penalty added if bill is not paid by 10th of month.

Power Rate.

Demand Charge $1.00 per month per each KW connected (figured from manufacturer's name plate rating of all motors installed

This demand charge entitles customer to 10 KWHrs. use of energy per month per each KW connected, additional energy at following charges:

Energy Charge

Next 60 KWH used per month per KW connected @ 5c per KWH
Next 120 KWH used per month per KW connected @ 3c per KWH
Next 180 KWH used per month per KW connected @ 2½c per KWH

Excess KWH used per month per KW connected @ 1c per KWH

MINIMUM—$1.25 for each KW connected, as figured from manufacturer's name plate rating.

Above rate NET. 5% Penalty added if bill is not paid by 10th of month.

(e) Proposed Rate Schedule. See Engineer's report pages 10 & 11 of this application for tentative sched-
296 ule.

(f) Proposed rates are set by order of the City Council.

VI. *Financial Data.*

(a) Assessed valuation of taxable property:

Fiscal Year

Item	1930	1931	1932	1933
Real Property	$6979020	$6833565	$5510386	$.....
Personal Property	$1697169	$1475457	$1036746	$.....
Total	$8676189	$8309022	$6547132	$.....
Basis of assessments:				
Real	75%	75%	75%	75%
Personal	75%	75%	75%	75%

(b) Bonded debt of the City of Plainview.

Kind of bond	Date	Amt. Issued	Inst. Due	Paid	Balance
Sewer Extension	1909	20,000	5% 40 yrs.	x	20,000
City Hall	1910	10,000	5% " "	x	10,000
Sewer & Water	1912	10,000	5% " "	x	10,000
Street Imp.	1912	12,000	5% " "	x	12,000
Street Imp.	1917	40,000	5% " "	x	40,000
Sewer	1921	75,000	5% Serial	24,000	51,000
Water Works	1921	25,000	5% "	8,000	17,000
Auditorium	1921	60,000	5% "	16,000	44,000
Refunding	1926	216,000	5% "	7,000	209,000
Street	1927	30,000	5% "	3,000	27,000
Water	1927	25,000	5% "	3,000	22,000

Kind of bond	Date	Amt. Issued	Inst. Due		Paid	Balance
Sewer	1927	20,000	5%	"	2,000	18,000
Refunding	1929	51,000	5%	"	3,000	48,000
Refunding	1931	80,000	5%	"	2,000	78,000
				-Outstanding		606,000
Held by Interest & Sinking Fund					5,000	
" " Water Fund					10,000	15,000
Net Bonded debt on August 1st, 1933						591,000

(c) Condition of Interest and Sinking Fund Au-
297 gust 1st, 1933.

Cash in hand	11,100
Plainview Bonds	5,000

The City lost $86,000 in failed bank in 1931. We expect to replenish our Interest and Sinking Fund out of our $129,000 delinquent taxes.

(d) Floating debt at date of application: None.

(e) Debt of overlapping taxing bodies:

Taxing Body	Total Indebtedness
County	$715,000.00
Independent School	$410,000.00
Irrigation District	None
Road District	"

(f) I, R. P. Smyth, Mayor of the City of Plainview, hereby certify that all financial obligations of the City of Plainview, Texas and of overlapping districts have been included in the foregoing financial data, (b), (c), (d) and (e).

R. P. SMYTH
Mayor City of Plainview.

(g) Give below particulars with reference to defalcations of applicant on any outstanding obligation past or present.

The City of Plainview has never defaulted on any of its obligations.

(h) Give below present tax rate per $1000 assessed valuation, separate as follows:

State tax rate	7.70
County tax rate	7.50
City tax rate	15.00
School tax rate	10.00
Total tax rate	40.20

(i) Statement of taxes levied by applicant only:

298

Year	Taxes Levied	Uncollected at Delinquent Date	Uncollected at Date of Application
1930	141985.02		28,397.04
1931	122289.41		39,840.92
1932	124635.53		62,317.76
1933	98206.35		49,103.18

(j) On what date are taxes levied? September 20th
On what date do they become payable? October 1st.
On what date do they become delinquent? January 31st. and June 30th succeeding due date.

(k) What are the penalties on delinquent taxes? 1% for each month succeeding due date until 10% accrues.

(l) Financial Statement City of Plainview August 1st, 1933.

Assets

Sanitary Sewer System	$250,000.00
Water System	350,790.00
Real Estate	63,500.00
Parks	77,000.00
Street Improvements Permanent	287,036.00
Fire Equipment	30,000.00
Furniture & Fixtures	3,000.00
Cash on hand	28,529.62
School Warrants	774.71
Delinquent taxes	129,000.00
Bills Receivable	3,000.00
	1,222,630.33

Liabilities, Aug. 1st, 1933.

Bonded Debt as per Schedule	$591,000.00

Receipts and Disbursements of City of Plainview, from Auditors Reports.

Fiscal Year 1928-1929		
Total Receipts	186,256.20	
Total Disbursements		199,387.89
Fiscal 1929-1930		
299 Total Receipts	205,538.12	
Total Disbursements		191,455.13
Fiscal Year 1930-1931		
Total Receipts	173,018.83	
Total Disbursements		175,887.54
Fiscal Year 1931-1932		
Total Receipts	145,359.24	
Total Disbursements		156,684.24
Fiscal Year 1932-1933		
Total Receipts	123,306.83	
Total Disbursements		129,237.37
Less Bonds Purchased		8,440.00
		120,797.37

• • • • • • • •

About seven thousand acres of land in Hale County is irrigated. Plainview's water supply is underground, and is found at a depth of 50 feet in inexhaustible quantities. Most of the large wells at Plainview are drilled to a depth of from 50 to 275 feet in order to take advantage of from two to three strates of water.

• • • • • • • •

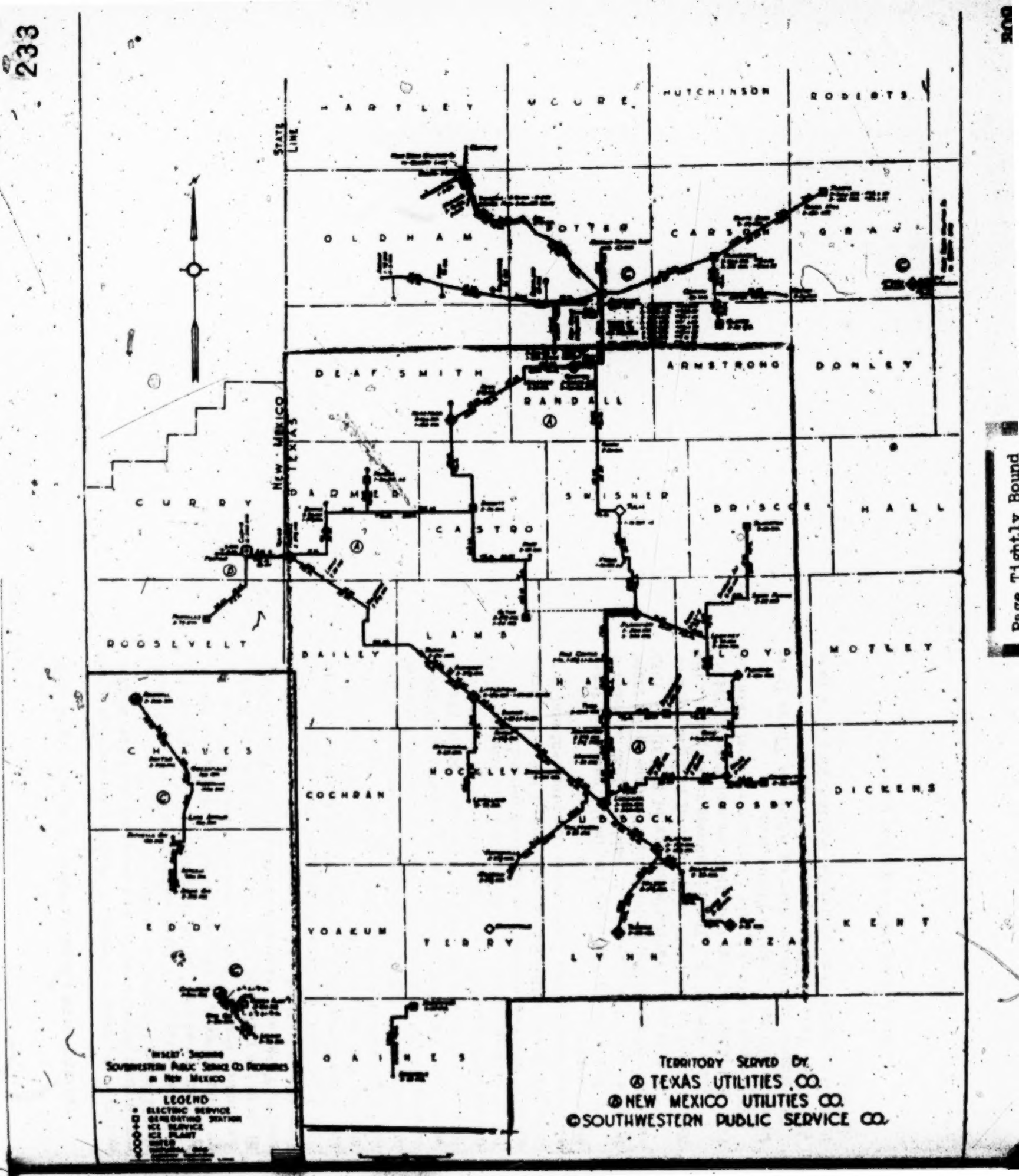
VII Legal Data

[An exhaustive legal memorandum in support of the authority of the City to undertake the project and issue bonds therefor followed.]

Hubert L. Allen, called as a witness on behalf of
300 the plaintiffs, after being duly sworn, testified in substance as follows:—

Direct Examination

I live at Lubbock, Texas. My experience in the construction and operation of electric utilities began in the early part of 1913, when I built an electric plant and distribution


HARTLEY
MOORE
HUTCHINSON
ROBERTS
STATE LINE
OLDHAM
POTTER
CARSON
GRAY
DEAF SMITH
RANDALL
ARMSTRONG
DONLEY
NEW MEXICO
TEXAS
CURRY
PARMER
CASTRO
SWISHER
BRISCOE
HALL
ROOSEVELT
DAILEY
LAMB
FLOYD
MOTLEY
HALE
CHAVES
HOCKLEY
COCHRAN
CROSBY
DICKENS
LUBBOCK
EDDY
YOAKUM
TERRY
LYNN
GARZA
KENT
GAINES
"INSERT" SHOWING
SOUTHWESTERN PUBLIC SERVICE CO. PROPERTIES
IN NEW MEXICO
LEGEND
ELECTRIC SERVICE
GENERATING STATION
ICE SERVICE
ICE PLANT
WATER
TERRITORY SERVED BY
Ⓐ TEXAS UTILITIES CO.
Ⓑ NEW MEXICO UTILITIES CO.
Ⓒ SOUTHWESTERN PUBLIC SERVICE CO.

system in the town of Senath, Missouri, and operated it as combination superintendent and manager until the middle of 1917, when I entered the Army.

After entering the Army, I was sent to France, and there as a member of the United States Army Engineers did a great deal of work in the construction of the electric plants, distribution systems, and transmission lines in France until about the middle of 1919, when I returned to the States, went to Texas and entered the service of the Texas Utility Company at Lubbock as local manager.

In July, 1919, I became manager of the Lubbock property of the Texas Utility Company, and continued as such until the first part of 1921. I was then made superintendent of production and distribution for what we then called the southern district of the division. I continued in that capacity, in the construction of lines and the installation of power plant facilities and distribution systems until about 1925, when I was made general superintendent of the entire division. And from that I was promoted to the position of division manager; and in 1929 I was made general manager of a new district that had been formed.

In 1934 I was made general manager of the entire area, and a few months later I was made vice-president and general manager.

The Texas Utility Company has in the past paid taxes to the Federal Government. It paid for 1935 a Federal energy tax of $25,262.04, Federal miscellaneous excise taxes
of $744 and a capital stock tax of $1,400. In 1935
301 it paid to the State of Texas and political subdivisions $88,326.31. The ad valorem taxes paid to the City of Plainview, Texas, in 1935 amounted to $3,254.50.

The territory served by the Company in West Texas is known locally as the South Plains area.

The witness identified a map on which the Plains Division of the Texas Utility Company is outlined. This was received in evidence as Plaintiffs' Exhibit 26, and is here reprinted.

(Here follows exhibit marked page 302.)

The Plains Division comprises an area of appro
303 mately 17,000 square miles and 17 counties. The
pography of that section is flat, level, and high plai
very sparsely settled. And the principal agricultural pr
uct is wheat in the northern half, and the diversity of c
ton and sorghum grains in the southern half. There
no industries in that area outside of the processing of
raw materials, such as flour mills, cotton gins, cotton
mills, and things of that sort. The Texas Utility Compa
was organized in the latter part of 1915. At that time t
country was practically all cattle ranches. Since then
has gradually and steadily developed into farming.

In 1930 the population of the rural part of the area w
about 2.4 people to a square mile. The total populatio
rural and urban, was 10.7 people per square mile. In 191
the only towns or villages served by the Company we
Plainview, Lockney and Lubbock. Today in the same are
the Company serves 52 towns, which have sprung up a
the country was settled. The Company has developed wit
the country.

The witness identified a tabulation showing the town
now served by the Company, their population and the num
ber of urban and rural customers. This was received i
evidence as Plaintiffs' Exhibit 27 and is as follows:—

CUSTOMERS SERVED

City or Community	County	Co. Serving Started	1930 Census	1935 Est. Pop.	Not Incorporated	Out Side Limits	Inside Limits	Total Served
Abernathy	Hale	1917	858	975		27	187	214
Aiken	Floyd	1926	110	125	14			14
Amherst	Lamb	1926	964	700		23	155	178
Anton	Hockley	1926	400	425		8	111	119
Bainer	Lamb	1926	Est 12	Est. 15	2			2
Bovina	Parmer	1928	200	175	114			114
Canyon	Randall	1924	2,821	3,275		15	807	822
Close City	Garza	1930	10	10	16			16
Cone	Crosby	1928	30	40	18			18
Crosbyton	Crosby	1925	1,250	1,350		13	323	336
Dawn	Deaf Smith	1931	10	10	11			11
Dimmitt	Castro	1927	829	1,000		6	247	253
Farwell	Parmer	1926	600	675	124			124
Floydada	Floyd	1916	2,637	3,250		18	680	698
Friona	Parmer	1928	731	735		8	184	192
Hale Center	Hale	1917	1,007	900		14	205	219
Happy	Swisher	1926	724	815		5	202	207
Hart	Castro	1929	20	35	58			58
Hereford	Deaf Smith	1925	2,458	2,500		76	684	760
Idalou	Lubbock	1923	538	350		3	96	99
Kress	Swisher	1926	200	200	81			81
Lariat	Parmer	1928	25	35	11			11
Levelland	Hockley	1926	1,661	1,750		7	428	435
Littlefield	Lamb	1925	3,218	3,650		29	661	690
Lockney	Floyd	1916	1,466	1,250		13	332	345
Lorenzo	Crosby	1923	739	640		3	144	147
Lubbock	Lubbock	1915	20,520	27,650		139	1,724	1,963
Meadow	Terry	1927	324	400			91	91
Muleshoe	Bailey	1926	779	975		11	229	240
Monroe	Lubbock	1926	25	60	23			23
Olton	Lamb	1928	687	800		6	195	201
Petersburg	Hale	1929	548	600		6	173	179
Plainview	Hale	1915	8,834	9,000		92	2,077	2,169
Post	Garza	1927	1,668	1,725		27	407	434
Ropesville	Hockley	1926	600	600	79			79
Ralls	Crosby	1923	1,365	1,375		5	302	307
Roundup	Hockley	1932	Est. 15	21	4			4
Seagraves	Gaines	1928	505	800		3	125	128
Seminole	Gaines	1928	300	500	130			130
Shallowater	Lubbock	1926	200	200	72			72
Silverton	Briscoe	1925	873	900		14	222	236
Slaton	Lubbock	1923	3,876	3,500		40	721	761
Southland	Garza	1926	500	435		5	60	65
South Plains	Floyd	1926	126	135	35			35
Sterley	Floyd	1926	89	105	35			35
Sudan	Lamb	1926	1,014	1,350		4	295	299
Tahoka	Lynn	1928	1,620	1,835		25	433	458
Umbarger	Randall	1926	18	30	18			18
Whitharral	Hockley	1930	12	40	27			27
Wilson	Lynn	1928	250	275	60			60
Wolfforth	Lubbock	1928	20	65	32			32
			68,286	78,261	964	745	12,500	14,209

* Typographical error. Should be 40.

PRINCIPAL COUNTIES SERVED

County	Population	Area	Population Square Mile
Bailey	5,186	1,030	5
Castro	4,720	896	5.3
Crosby	11,023	870	12.7
Deaf Smith	5,979	1,549	3.9
Floyd	12,409	1,011	12.3
Gaines	2,800	1,540	1.8
Garza	5,586	870	6.4
Hale	20,189	1,036	19.5
Hockley	9,298	867	10.7
Lamb	17,452	1,028	17.1
Lubbock	39,104	868	45.1
Parmer	5,869	902	6.5
Randall	7,071	937	7.5
Swisher	7,343	898	8.2
Briscoe	5,590	903	6.2
Lynn	12,372	864	14.3
Terry	8,833	870	10.2
	181,924	16,933	10.7

The Company has another system in Texas known
305 as the Central Texas group. That is centered about Marlin and Mexia, Texas, and Falls, Freestone, and Limestone Counties. There is no physical connection between the two groups. The approximate distance between those two groups, by air line, is 400 miles. There are 19 towns, all small, serviced by the Central Division. The network of the transmission system of the Plains Division consists of about 750 miles of transmission lines. We have one main generating station located in the approximate load center of that territory, and supplemented by stand-by plants at strategically located points, to guarantee continuity of service and take care of any emergencies that might arise, and an inter-connection with neighboring transmission networks, to augment the service of our plants. We have installed a total generating capacity in the Plains Division of about 14,000 kilowatts. We have at this time about 14,000 customers in that area:

The plants and lines are modern, having all been built practically since—the transmission system, particularly—since 1928. And the main generating station was completed in 1930, placed in service January 1, 1931—a modern, gas-fired steam plant.

The distribution systems in the various towns would vary in age from the oldest constructed originally about 1913, on down to the youngest, finished in the year 1929. The older systems have been properly maintained to the point that the entire distribution and transmission and power plant facilities of the Plains Division can be considered modern and right up to the minute. The latest engineering practices have been used all the way through, in construction and maintenance. The average distance between the towns served throughout the Plains Division is approximately 14 miles. Due to the sparcity of population in rural areas, it is not practicable to obtain many
306 customers from the farms and places of that kind. On the average, the size of farm out there is a little better than 400 acres. Consequently there are relatively few people per mile of line. The city of Plainview has about 9,000 population. The other large towns on the system are Lubbock, Floydada, Slaton, Littlefield, Canyon,

Hereford. Excepting Lubbock and Plainview, there are no towns on the system which will run above 3,500 population. There is a municipal plant at Lubbock. The only town of more than 5,000 population in which we have no competition is the town of Plainview. The historical cost of the company's distribution system and property in the town of Plainview is $807,593.91. That figure embraces only the actual cost of the physical properties within Plainview alone. Plainview is served from the main generating plant located at Tuco, about 32 transmission-line miles, or 28 highway miles from Plainview. The allocated portion of the Tuco plant properly chargeable to Plainview as necessary to Plainview service is $173,751.36. A portion of the transmission system is devoted to the service of Plainview.

The witness identified a tabulation showing the gross revenues of the Companies from both Plains and Central Divisions for the years 1934 and 1935, which was received in evidence as Plaintiffs' Exhibit 28, and reads as follows:

307 *Exhibit 28.*

Texas Utilities Company

Income Statement

Twelve Months Ended December 31

	1935	*1934*
Gross Operating Revenues	$1,285,139.03	$1,364,878.2
Operating Expenses and Taxes	805,103.64	826,854.2
Net Operating Revenues	480,035.39	538,024.0
Non Operating Income—Net	3,097.79	2,376.3
Balance	483,133.18	540,400.3
Retirement Accruals	95,657.86	119,152.6
Gross Income	387,475.32	421,247.6
Deductions from Gross Income—		
Interest on Funded Debt	336,595.76	351,445.5
Interest on Unfunded Debt	9,436.60	24,228.9
Amortization of Debt Discount and Expense	169.20	
Total Deductions	346,201.56	375,674.5
Balance—Net Income	41,273.76	45,573.1

During the years preceding 1934 the Company op-
308 erated at a loss. The gross revenue derived by the company from its electric business in Plainview during the years 1934 and 1935 was $151,695.10, and $145,718.05, respectively. I have examined the plans and specifications for the proposed municipal plant in Plainview, obtaining them from Montgomery and Ward, engineers, Wichita Falls, Texas, engineers for the city of Plainview. I have also examined the rates proposed to be put into effect by the city of Plainview as set out in their PWA application. On the present average consumption our rate now in effect in Plainview is from 12 to 15 per cent under the proposed rates in the application. I do not believe that the municipal authorities in the Town of Plainview circulated a petition seeking to have customers agree to take the municipal plant's current. The Texas Utilities Company has a contract with the city of Plainview for street lighting and water pumping. The wells are owned by the Texas Utilities Company.

For the year 1934 the Company's revenue from the municipal street lighting and other municipal use, exclusive of water pumping, was $4,366.34. For 1935, $4,389. An analysis of the city's rates as proposed in their PWA application compared with our present rates, show that there are certain brackets where they are equal with our rates. I do not think there are any brackets within which the city's proposed rates in their application are lower than our present base rate in Plainview but I am not positive until I make a more detailed comparison of that. I have now a graph which shows the comparison between the rates.

Whereupon the following occurred:

Q. Have you now a graph which shows that comparison?
A. Yes.

Q. Will you examine that and state what the facts are with reference to whether the city's rates are equal to or as low as or lower or higher than our rates in the
309 various brackets?

Mr. Scott. This witness has testified, if your Honor please, that the rates will be 15 per cent higher—the positive testimony of this witness. Now they are trying to circumvent the testimony of their own witness and

show by a comparison of some graph or chart, apparently not prepared by this witness, that there is going to be loss and damage suffered by this company because the rates are going to be lower. They are contradicting their own witness, and we submit that it is not proper examination and should not be permitted here.

Mr. Crenshaw. If counsel will pardon me: he said generally the rates were 12 or 15 per cent under the proposed rates, and he also testified that in certain brackets his recollection was that they were as low or lower.

The Court. I will sustain the objection. I think you are going too far afield.

Mr. Crenshaw. We note our exception.

There was no cross-examination.

Whereupon **George H. Carter** was called as a witness for the plaintiffs and, being first duly sworn, testified as follows:

Direct Examination.

I live at Marlin, Texas. I am a lawyer. I am attorney for the plaintiff, Texas Utilities Company, in the Central Texas Division; also a director of the Texas Utilities Company and a vice-president. The town of Marlin and the town of Plainview in the autumn of 1933 filed applications with the Public Works Administration for loans and grants to build municipal electric plants. I attended a conference in Washington on the first of March, 1934, at which a protest of the company to the Public Works Administration in regard to both of those projects was considered.

310 I arranged that conference by letter. The conference was arranged with the Electric Power Board of Review of the PWA. My first contact with that board was about the 22d day of August, 1934. As I have stated, the town of Marlin put in an application for a loan and grant to erect a municipal plant in the fall of 1933. That first, of course, went to the advisory board for Texas, and I was informed later that the application had been forwarded to Washington. I had filed a protest and I was informed that that protest accompanied the file to Washington. I heard nothing from it for a number of months, and I did not know what was happening until about the 18th day of

August I received a telegram from Colonel Henry T. Hunt, Chairman of the Electric Power Board of Review, in Washington.

The witness then identified a telegram, which was received in evidence as Plaintiff's Exhibit 29 over objection by counsel for defendants that it was irrelevant, incompetent, not binding on any of the defendants and that there was no evidence of the authority of the sender, and exception noted.

Plaintiffs' Exhibit 29

"Bartlett, Carter & Rice, Attorneys, Marlin, Texas, August 18th

"Reference project Marlin electric system I suggest you inform client this board wishes to ascertain whether company will place in effect rates less than those offered by municipality. Possibly its representative will call on me here promptly in order that this matter may be determined.

"H. T. Hunt, Chairman, Electric Power
Board of Review, for the Administrator."

In response to this telegram I came to Washington to confer with Mr. Hunt. At that time I discussed the question of what rates the company might put into effect with Colonel Henry T. Hunt and with Mr. Otto Rau to whom Mr. Hunt referred me as being the rate expert for
311 the Electric Power Board of Review, for the Administrator. I saw them here in Washington in the Interior Building. Colonel Hunt was the chairman of the Electric Power Board of Review.

Q. What did Colonel Hunt say to you as to why he was interested in the question of the company's rates?

Mr. Holtzoff. May this be subject to our objection and exception, please?

The Court. Yes.

Whereupon the witness resumed his testimony as follows:

Colonel Hunt stated that the city of Marlin had proposed to furnish electric service to its citizens at rates 15 per cent lower than those of the Texas Utilities Company, and that unless the Texas Utilities Company would lower its rates equal to or below the rates proposed in the city's ap-

plication, the application would be granted. He then referred me to Mr. Otto Rau and told me that Mr. Otto Rau was a member of the Electric Power Board of Review for the Administrator and was the rate member of that board. I then talked with Mr. Otto Rau on the same date and attempted to go into the matter with Mr. Rau, of the economic feature. When I attempted to go into that matter, and did go into it, Mr. Rau said, "We are only concerned with the matter of rates, and unless your company can meet these rates the application will be granted." And Mr. Hunt and Mr. Rau both suggested that the matter would be deferred for a limited time until I could tell them what the company would do with reference to rates. I then returned to Texas for the immediate purpose of getting in touch with the operating authorities of the company to the end that we might endeavor to lower our rates to preserve our property. Over the next few months we worked at it diligently. During that time Colonel Hunt telegraphed me further with regard to this matter of rates on the 28th of August, 1934, and I received a further telegram dated October 2, 1934. The one of August 28th
312 is signed "Henry T. Hunt, Washington." The one of October 2d, I believe it is, is signed by H. T. Hunt, Chairman, Electric Power Board of Review for the Administrator.

The witness then identified two telegrams, which were received in evidence as Plaintiffs' Exhibits 30 and 31, over objection by counsel for defendants that the telegrams were incompetent, not binding on the defendants and that the sender's authority did not appear, and exception noted.

Plaintiffs' Exhibit 30

WESTERN UNION

6D D 11 GOVT NM 1 EXTRA

WUX FORSAMHOUSTON TEX AUG 28 1934

GEORGE H. CARTER

ATTORNEY AT LAW MARLIN TEX

313 RE MARLIN PROJECT CANNOT CONSIDER REVISED RATES UNLESS SUBMITTED PROMPTLY

HENRY T HUNT WASHINGTON 820A 29

Plaintiffs' Exhibit 31

POSTAL TELEGRAPH

D131 32 GOVT 7 EXTRA XU-G WASHINGTON DC 2 623P
1934 OCT 2 PM 6 14

GEORGE H CARTER—
MARLIN TEX—

WHEN WILL WE RECEIVE RATE SCHEDULES FOR MARLIN STOP NECESSARY SAME BE SUBMITTED PROMPTLY OTHERWISE MUST PROCEED WITH ACTION ON DOCKET SIXTY EIGHT EIGHTY FIVE—
H T HUNT CHAIRMAN ELECTRIC POWER BOARD OF REVIEW FOR THE ADMINISTRATOR

In the meantime the City of Plainview had filed an application, which was submitted to the State Board in Texas. The company filed a protest which was forwarded to Washington to the Electric Power Board of Review. I asked for a hearing before the Electric Power Board of Review, in Washington. On January 16 I saw Major Fleming, whom I found in an office in the corner of the Interior Building. He assured me he would arrange a joint hearing for these two projects on March 1. I understood him, to use the statement, to be "very close to the Administrator," and could arrange a hearing if he would. He was some sort of assistant in charge of certain things. And I received a telegram from Colonel Hunt, shortly thereafter, assuring me the conference was arranged for March 1. A number of us came to Washington for that conference. Mr. Crenshaw was here. Mr. Hubert L. Allen, who has testified, and Mr. Bradley who is connected with the Stone & Webster Service Corporation of New York, which company has an operating contract or management contract with Texas Utility. Mr. Don A. Henry was present. Mr.
314 Boshel and Mr. Veitch were present. Mr. Veitch, a member of the firm of Black and Veitch, consulting engineers of Kansas City, had been employed by Texas Utility Company and had made surveys of the towns of Marlin and Plainview, and made a report for the purpose of this hearing, so that we could show the situation to this Board. The conference was held in the Interior Building, in the office of Mr. Otto Rau. Mr. Rau was present. There was another gentleman present, who purported to be an

employee of the Public Works Administration, whom I had seen in Mr. Rau's office previously, but he took no part in the hearing, but did apparently pay attention to what was going on. I was introduced to him. I have an idea that his name was Wilson.

Q. Will you tell us briefly what occurred at that conference?

Mr. Holtzoff. We object on the same grounds as not binding on the defendants.

The Court. I overrule the objection.

Mr. Holtzoff. May we have an exception please?

Whereupon the witness resumed his testimony as follows:

Mr. Veitch, at Mr. Crenshaw's suggestion, went into the economic features of the Plainview situation and the damage that would result to the company, how it would affect the ability of the company to serve small towns in given communities at the rates they had in force at that time, or possibly at any rates at all. And Mr. Crenshaw made a statement along those lines.

Mr. Rau said: "Gnetlemen, as I told you this morning, and with reference to the Marlin application, the Board is not interested in the economic features. Unfortunately the regulations are so framed that we must consider alone the application of the town presenting it and its effect on the rates of that town, and not the effect that it would have
on other smaller towns and country communities,
315 even though the effect might be adverse. We are
confined simply to the question of rates in the town putting in the application."

Mr. H. L. Allen, the general manager of the Plains group, in which Plainview is situated, then presented a rate schedule—I think, at Mr. Crenshaw's suggestion. We jumped rather rapidly to a proposed rate that had been just previously proposed to the City Commissioner of
Plainview. That rate was prepared as a result of
316 our earlier conference with Mr. Hunt. It was pre-
pared in an effort to preserve our property. Mr. Rau, while he had been entirely courteous all the way through and had followed everything we had said—I interrupted him at one time and asked him if he was inter-

ested in the facts I was presenting. That was during the morning. And he said, "I am not interested particularly, because of what I have already said; that is, the rates are the only matter we can consider."

Now, when Mr. Allen presented the rates, that afternoon; and what we called the "ultimate rate", Mr. Rau sat up in his chair, gave every evidence of being interested, and said, "That is the sort of rate we are looking for," and appeared to be enthusiastic about it, and asked Mr. Allen a number of questions with reference to it, among which he said, "What provision have you made in this rate schedule for preserving your revenue between the time that you institute this rate and the time that the people, your customers, build up their use of electric current under it? There will be a sag there."

Mr. Allen said, "That is true, Mr. Rau. And we have taken care of that by freezing the revenues"—and proceeded to explain the method. Mr. Rau remarked that we were perfectly right in doing it, and had a right to do so.

Mr. Rau then said, "I want to be sure this rate is installed I don't want you to come here and say, 'We are going to install it,' and then not install it. But if this rate is installed, then I would say that the municipal plants at Marlin and Plainview cannot pay out their loan, they cannot meet their debt requirements. And I will write to the mayors of those two towns and suggest to them that they withdraw their applications."

We did prepare letters to the Electric Power Board of Review, in which we said that the rates were being installed in the towns of Marlin and Plainview, and filed those with the Board.

Mr. Rau said that if the two towns did not with-
317 draw their applications, the applications would be denied. That was all that took place at the conference, in regard to the proposed rate. I saw Major Fleming immediately following the conference with Mr. Rau. I went to Major Fleming's office in the Interior Building. (At this point the defendants objected to any testimony about the conference with Major Fleming. The objection was overruled and an exception noted.) I told Major Fleming the result of the conference with Mr. Rau, and

that Mr. Rau had stated that these applications would be denied.

We saw Mr. Rau again while we were in Washington on that visit. We felt pretty good over the result of this rate; we had felt pretty badly on having to make this cut. But it had resulted in the accomplishment of our purpose; that was to preserve our properties.

And it was suggested that we go back to Mr. Rau and say to him—make this proposition: We will install this same rate in all of the towns served by the Plains group and the Central group of Texas Utility Company—

We went to Mr. Rau a few days later. It may have been Friday following March 1; and we told Mr. Rau that the Texas Utility Company would immediately install the same rate that he had approved in all of the towns served by the Plains group and the Central group of Texas Utility, if the Electric Power Board of Review would agree to refuse to receive any further applications from any towns served by our company in those two areas, or any towns served by that company, you might say.

Mr. Rau said it would be impossible to make that agreement, "because we are bound to accept and consider every application filed before the Board, but I am assuming that at no time none of your towns or none of the towns served by you can make a better showing than that made by Marlin or Plainview, in which case, while the applica-
318 tions will be considered, they would take the same course and would likewise be rejected for the same
319 reason—that they cannot pay out." The assumption was that they would not pay out if we put the same rate all over Texas.

With that assurance, soon afterwards we installed the same rate in all towns served by our company. We put it into Marlin and Plainview and all other towns served by the company.

There was no cross examination.

Whereupon **Otto M. Rau** was called as a witness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct Examination

I live in Philadelphia. I am a consulting engineer. My original experience was with the Edison-General Electric Company in the drafting department, engineering work. I went from there to Milwaukee as a resident engineer in the electrification of the railway system and also the installation of the lighting system. I remained as a resident engineer until the work was more or less completed, and I was then appointed as chief electrician for the company. I was then appointed as general superintendent of the lighting department, in which position I was for twenty years, about.

Then I became the manager of the Commonwealth Power Company, which is a competing company in Milwaukee. I was with that company six years, and the Milwaukee Electric Company finally bought that out.

Then the war started and I was appointed as director of power in the Philadelphia District for the Emergency Fleet Corporation. After that I went with Day and Zimmerman as assistant to Mr. Zimmerman. That is an engineering and management firm for electric utilities. I left them to join the Stotesbury management which was supposed to manage the railway systems in Philadelphia, New York, Chicago, Buffalo, and so forth, the consum-
320 mation of which never materialized. In other words, I was about three years in that connection and the deal as originally outlined did not go through. After that I was with the Giant Power Board of Pennsylvania for about three years, and after that with the St. Lawrence Power Development in New York State. After that General Consulting business.

I came to Washington to be in the PWA, as consultant to the Administrator, Mr. Harold L. Ickes. My principal work was confined to studying the projects for municipal power plants, to arrive at a conclusion as to their advisability for final action.

There were in the Public Works Administration three different divisions, one was the Examining Division for Engineering; another, Examining Division for Legal, and the third was the Examining Division for Finance.

When an application arrived in Washington from the field for a municipal electric power plant, there were three copies. One copy was submitted to each of the divisions, the Legal Division, the Financial and the Engineering Divisions. Those divisions considered them simultaneously. After these three divisions had considered and made their recommendations, at the early stages the only ones that were referred to me were where there was a wide divergency as to the decisions of the three divisions.

That seemed to be the general situation. A number of them were submitted to me. I do not assume that all of them were submitted to me, but quite a number were submitted to me under those conditions. One of them would approve and another one would reject it, and where there was any difference of opinion between the three divisions that project would be referred to me. My function was to investigate it and see what could be done about it. The impression that I obtained from the results of the decisions by those divisions was that there was not a general policy.

Very few electric power projects were being finally
321 approved at that time. I cannot say how many, but comparatively few. No doubt the creation of my position there was due to the fact that all the other classes of projects, such things as bridges, sewers and water works, buildings and such things, would go through with reasonable promptness, while the municipal electric projects were lagging. There were very few of them moving along the way they had anticipated they should.

I discussed the situation as I found it first with Mr. Harry Slattery. I came in contact with him more than anyone else when I first came into that department. I don't know his title. He was secretary to the Administrator, I believe. The discussions on these projects with Mr. Slattery apparently indicated that there should be a more formal way of approaching the projects on these muncipal plants, and then Mr. Hunt came into the picture in connection with the Electric Power Board of Review.

There was at that time, that is, February, 1934, a general board of review in PWA. They reviewed unfavorable decisions as to all projects. I was appointed on May

9, 1934, on an organization in the Public Works Administration known as the Electric Power Board of Review.

Whereupon there was received in evidence, as Plaintiffs' Exhibit 32, Order No. 73 of the Federal Emergency Administration of Public Works, reading as follows:—

322 *Plaintiffs' Exhibit 32*

P. W. 11561

Federal Emergency Administration
of Public Works

May 9, 1934 Washington, D. C.

Order No. 73

Establishment Electric Power Board of Review

Effctive May 9, 1934, the "Electric Power Board of Review" is established, membership, Henry T. Hunt, Morris L. Cooke, and Otto M. Rau.

It will be the duty of this Board to review disapprovals, and special conditions imposed, by any division of P. W. A. and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair, improvement or extension of electric power plant facilities.

The Technical Board of Review is instructed to refer to said Board, Henry T. Hunt, Chairman, Room 5139, all such projects now pending before it on which it has not given notice of hearing.

The Projects Division is instructed to refer to Mr. Hunt summary report folders for such applications as have heretofore been and may hereafter be disapproved by any division or approved with any special conditions appearing on any divisional report.

The Electric Power Board of Review is directed to formulate and submit to the Administrator instructions for the guidance of the several divisions with regard to competitive situations and other controversial questions affecting this class of projects.

(s) HAROLD L. ICKES
Administrator.

Upon the organization of the board it proceeded
323 to consider and reconsider municipal electric power
projects which had theretofore been disapproved by
any of the three divisions. Practically all projects which at
that time were not approved were referred to the board
if there was a difference of opinion between the examining
engineers. And projects coming along after the formation
of the board were referred to us also whenever that situ-
ation existed.

After the organization of this board it considered the
situation arising from the lack of a common policy in re-
gard to municipal electric projects by the Examining Divi-
sions. There was considerable discussion among the mem-
bers of the board to arrive at a definite policy. During
those discussions the criterion called "social desirability"
was discussed. That, broadly stated, as applied to a muni-
cipal electric project consisted of three elements. One was
popular approval; there had to be evidence of popular ap-
proval for the project. The second was that it had to be
self-liquidating, and the third one was that it had to be
socially desirable. Those were the three elements on which
the final decisions as to a project were arrived at. The
greatest weight on social desirability was, Would it bene-
fit the greater number of people? The benefit was usually
decided on what the difference would be if the conditions
existed as they were or if they existed under the plants of
the project. We did not place a great deal of importance
on employment as bearing on social desirability. Primar-
rily, the employment was more or less limited on municipal
projects as compared with a great many of the others, and
the class of employment was too technical to become se-
lected from the local unemployment situation. The people
who had to be employed on a municipal electric project
were such skilled labor that they could not be found in most
communities. The number of people employed on those
projects as a type was considerably less than on other
projects. The board found the principal element of
324 social desirability in municipal electric projects in
the difference in the cost of service to the consumers.
If the cost of service to the consumers was lower from the
project than they were obtaining under the existing condi-

tions, it was considered very desirable from a social standpoint. That means, if the rates suggested in the application were lower than the existing rates.

Soon after its organization, the board considered the problem which might arise if the private utility reduced its rates below those suggested in the application of the city. Mr. Hunt, a member of that board, prepared a memorandum to Mr. Ickes pointing out the existence of this problem. Sometime after that Mr. Ickes sent to the board copies of a letter which he had written to the President stating that problem, and a copy of the reply which the President had sent Mr. Ickes giving his answer on the problem.

Q. Did that exchange of correspondence furnish to the Board the policy upon which it acted thereafter? A. To a great extent it did.

Mr. Frank. I would like to make the same objection there, your Honor.

The Court. I think I will sustain that objection. The question called for the contents of the communications.

Mr. Acheson. If I may be permitted to say so, that question does not call for the contents.

Extended discussion occurred between counsel and the Court. The objection was sustained and exception noted.

The witness resumed his testimony as follows:

I am familiar with PWA Press Release No. 989, which was put out some time after these various discussions with reference to these letters. The date was September 27, 1934. The Electric Power Board of Review followed
325 in its actions the policy contained in Release No. 989 in quotations marks attributed to Mr. Ickes.

Whereupon there was received in evidence as Plaintiffs' Exhibit 33, PWA Press Release No. 989, reading as follows:

Plaintiffs' Exhibit 33

PWA Press Section
Immediate Release — Release No. 989

Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting
326 those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program.

In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the Public Works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there have been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable
327 where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect

rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will co-operate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project
328 is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

The witness resumed his testimony as follows:

Applications by municipalities for electric generating and distributing projects came before the Electric Power Board of Review.

Whereupon the following occurred:

Q. When those applications came before the Board, did the Board examine the rates, in the first instance?

Mr. Frank. I object, your Honor. This is now going into the activities of the Board, the intradepartmental activities of the Board.

The Court. I do not think that is in the same category as the other. It is what they did—and then reported, I suppose, to the Director.

After argument of counsel, the following occurred:

The Court. I cannot see why there should be an inquiry into the things this Board considered. I am going to sustain the objection. I cannot rule contrary to my own judgment. I think the question has nothing to do with what is before us.

The question here is, What was done by the Administrator.

Of course, if the question here was whether he acted in an arbitrary way without any advice or without any careful consideration, then that would be different. However, I have no doubt that the fact is that wherever an application came in, these people in this office probably gave very careful consideration to the town where the project was, the population of the town, the evaluation of the property in the town, the character of the work done there, the labor situation there, whether the town was adequately supplied with electrical conveniences or was not—all those

329 things I shall take for granted.

But I cannot see how that has anything to do with the question of whether the Secretary himself violated the terms of this statute, or if you know.

The Court. Gentlemen, I want to understand and to see the questions that will be brought before a higher Court. But I cannot see how everything that this Board considered and thought during the time it was in existence, has anything to do with the question of whether this loan was valid or invalid.

I have to take some position on it, and I shall sustain the objection.

Mr. Acheson. I note an exception, if your Honor please.

By Mr. Acheson:

Mr. Rau, was it the practice of the Board, if it concluded that the rates contained in any application of a city would not reduce the rates charged for electric current, to notify the city that in the opinion of the Board the application lacked social desirability?

Mr. Scott. The same objection.
The Court. The same ruling.
Mr. Acheson. I note an exception.
The Court. Yes.
Mr. Acheson. And we offer to prove that the Board itself directly notified the cities that their applications had no social desirability unless they would reduce rates.
Mr. Rau, were private utility companies given an opportunity to appear before the Board and offer to reduce their rates below the rates which a city proposed in its application?
Mr. Scott. The same objection.
Mr. Frank. We object to the form and the substance.
The Court. The same ruling.
Mr. Acheson. We note an exception, and offer to
330 show that the practice of the Board was to permit private utility companies to appear and offer to discuss rates which were to be put in effect, lower than the rates in application, and deprive the application of social desirability.

By Mr. Acheson:
Mr. Rau, was it the practice of the Board to inform private utility companies that proposed reductions in rates by them would not be considered until they were actually put in effect?
Mr. Scott. The same objection.
The Court. The same ruling.
Mr. Acheson. We note an exception. And we offer to prove that the Board followed the practice of notifying private utilities that they must actually put in effect a reduction in rate before the Board would actually consider the bearing of that reduction on the social desirability of the city's application.

By Mr. Acheson:
Was it the practice of the Board to permit a city, after a utility had actually put into effect a lower rate, to appear and, if it could, amend its application and offer a still lower rate than the utility?
Mr. Scott. The same objection.
The Court. The same ruling.
Mr. Acheson. We note an exception and offer to prove

that it was the practice of the Board that, after a city had put in an application, the city was given an opportunity to amend its application and so attempt to charge a still lower rate than the utility.

By Mr. Acheson:

Mr. Rau, was it the practice of the Board to disapprove an application, on the ground of social undesirability, where the utility actually put in a lower rate and
331 the city was unable to meet that rate?

Mr. Scott. The same objection.

The Court. The same ruling.

Mr. Acheson. We note an exception, and offer to prove that the Board was in the practice of disapproving an application where the utility offered to put in a lower rate and the city was not able to meet that lower rate.

The witness resumed his testimony as follows:

I recall a conference with a group protesting against applications of the cities of Marlin and Plainview, Texas, for electric generating and distributing systems. My recollection is that they discussed a rate which they proposed to put into effect in Marlin and Plainview, Texas. My recollection of the conversation in this conference was that if a lower rate were proposed by the utility, which would affect the earnings of the proposed plant, so that it would not be self-liquidating, the project would not be approved.

I could not say how many instances there were in which I had similar conversations with representatives of private utilities. There were a considerable number.

Whereupon there was received in evidence as Plaintiffs' Exhibit 34, Order No. 141 of the Federal Emergency Administration of Public Works dated March 16, 1935, as follows:

P. W. 30986

Federal Emergency Administration
of Public Works

March 16, 1935.

Order No. 141.

The Electric Power Board of Review is hereby dissolved and the dockets will be returned to the Public Works Administration.

The services of Mr. Henry T. Hunt, General Counsel, will be required for special assignments by the Ad-
332 ministrator of Public Works in view of the pending new program; he will also have referred to him all questions relating to public works requiring legal interpretation. The Chief Counsel's opinions will be coordinated with the administrative procedure by routing through the office of the Director, Legal Division, Public Works Administration, before being presented for the signature of the Administrator.

HAROLD L. ICKES
Administrator.

Whereupon the witness was temporarily withdrawn.

On May 11, 1936, the witness resumed the stand and testified as follows:

Earlier in my testimony I was asked this question:

"Q. Did Mr. Hunt prepare for the Board a memorandum to Mr. Ickes pointing out the existence of this problem?"

My answer was, "Yes; he did."

I did not see Mr. Hunt give such a memorandum to Mr. Ickes. Mr. Hunt drafted and submitted to me for my comments a memorandum on that question. It was discussed between us that this memorandum was prepared to bring the matter under discussion before the Administrator. That is what the memoranda were for. I worked on a number of such memoranda. I was also asked whether Mr. Ickes sent to the Board copies of a letter which he wrote to the President and the reply which the President sent to him, and the court directed me to answer that question yes or no, and I answered it, Yes. Now I did not see Mr. Ickes give Mr. Hunt that memorandum. But Mr. Hunt did bring the correspondence between Mr. Ickes and the President to my attention; yes, he brought it to my attention. I believe I saw the original. I am not sure of that. But I do recollect that one of the memorandums was signed with the President's initials in lead pencil. Of course I
333 was in the conference at the time it was done and I just glanced it over and laid it back. So I have that kind of a recollection because it was quite evident to me it was signed in lead pencil as if somebody did it in a hurry.

There was no cross examination.

334 Whereupon **N. T. Veatch, Jr.**, was called as a witness on behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct examination

I live in Kansas City, Missouri. I am an engineer, a member of the firm of engineers, Black & Veatch. I am a graduate of the engineering shcool of the University of Kansas, 1909. Between the date of graduation and the formation of the firm of Black & Veatch, I spent one year as instructor at the University of Kansas in the engineering school; two years on construction of electric light and water plants, and a little over a year as superintendent of the water system at Keokuk, Iowa. In 1914 I became a member of the firm of Black & Veatch, and have since been connected with it. Our practice has covered the field of municipal improvements, such as water supply, electric lighting and power, sewage and sewage disposal, valuation work, and special reports. I have designed 25 or 30 electric power and light plants. I have valued electric light and power plants having a total value which would exceed $500,000,000. I am familiar with all the factors of cost which go into the construction of an electric light and power plant. I was employed by the Texas Utilities Corporation to make an estimate as to the cost of constructing the proposed municipal plant in Plainview, Texas. In connection with doing that, I went to Plainview and studied the actual situation and familiarized myself with the city's application to the Public Works Administration. I also studied the plans and specifications of the engineers employed by the city of Plainview. As the result of that study and investigation, I have prepared an estimate of cost of constructing the municipal light and distribution system proposed by the city of Plainview in its application to the Public Works Administration, showing, among other things, the labor cost and other costs.

Whereupon the witness identified as the estimate
335 prepared by him a document which was marked plaintiffs' Exhibit 61 for identification offered in evidence and, upon objection by defendants on the ground of irrelevancy, excluded. An exception was allowed. In

the course of defendants' reply testimony, the objection was withdrawn and the document received in evidence. Plaintiffs' Exhibit 61 is as follows:

Plaintiffs' Exhibit 61.

Subject: Plainview, Texas.

Work: Estimate of Cost of Project proposed by City and outlined in specification filed by it.

	Material Plus General Direct Costs	Labor Plus General Direct Costs	Total
Building	$13,711	$7,400	$21,111
Engines and Auxiliaries	150,380	13,970	164,350
Distribution System			
Poles, Towers and Fixtures	22,355	13,219	35,574
Conductors	18,325	8,056	26,381
Transformers	22,091	1,581	23,672
Services	6,691	6,675	13,366
Meters	22,062	3,559	25,621
Street Lighting (overhead)	4,466	1,734	6,200
	$260,081	$56,194	$316,275
Plus Contractors' Profit at 10%	26,008	5,619	31,627
	$286,089	$61,813	$347,902
Plus Engineering at 5%			17,395
			$365,297
Plus Interest during construction			6,642
			$371,939
Plus White Way (to be purchased)			23,529
			$395,468
Plus Storeroom and Garage at City figure			1,765
Plus transportation Equipment figure			1,529
Plus Office Equipment figure			1,176
Total			$399,938

336 Whereupon the witness was asked to state the percentage which the cost of labor at the site would bear to the total cost of the Plainview municipal electric project. An objection made by counsel for defendants was sustained. Counsel for plaintiffs offered proof that the cost of labor at the site would be 14% of the total cost of the project. The offer of proof was rejected and an exception of it was noted and allowed. Whereupon the witness resumed his testimony as follows: I have made a study of the various factors which enter into the division of business between a

municipal electric plant and a competing private utility. I have also made a study of the consumer accounts of the Texas Utility Company in Plainview, Texas, as well as a study of the rates of the Texas Utility Company now in effect in Plainview, and the rates proposed to be put into effect by the City. Based upon these factors, I have an opinion as to the percentage of business which the municipal plant would obtain if built and operated as proposed.

Whereupon the witness was asked to state his opinion. An objection by counsel for defendants was sustained on the ground that the matter was purely speculative. Counsel for plaintiffs offered to prove that the proposed municipal system, it built, would obtain fifty per centum of the existing business from Plainview, Texas. The offer of proof was rejected and an exception was noted and allowed.

Whereupon the witness resumed his testimony as follows: I have prepared a schedule, which, in my opinion, is correct, showing the dollar revenue, based on 1935 operating figures of the Texas Utilities Company, which the Company would lose and the City plant would gain in the event that it is built and operated as proposed.

337 The witness identified as his schedule a document which was marked plaintiffs' Exhibit 62 for identification. This was offered in evidence and, upon objection by defendants on the ground that it was speculative, was excluded. An exception was noted and allowed. Subsequently, in the course of defendants' testimony, the objection was withdrawn and plaintiffs' Exhibit 62 was received in evidence. The Exhibit is as follows:

Plainview, Texas
Estimate of Probable Revenue of
City Plant

This estimate is based upon assumption that City will receive an average of 50% of the revenue now enjoyed by the Company, after deducting revenue from water and street lighting, and adding street lighting to the 50% figure, as follows:

Total Revenue to Company 1935	$145,718
Total for water	$11,364
Total for street lighting	4,389
Total water and street lighting	$ 15,753
Total less water and street lighting	129,965
50% of $129,965	64,983
Plus street lighting	4,389
Total revenue	$ 69,372

Whereupon the witness resumed his testimony as follows: I have prepared an estimate of the expense of operating the proposed City plant, if that plant is to obtain the gross revenue which is shown in plaintiffs' Exhibit 62. In my opinion the estimate is correct.

Whereupon the witness identified as the estimate prepared by him a document which was marked plaintiffs' Exhibit 63 for identification, offered in evidence and, upon objection by defendants on the ground that it was speculative, excluded. An exception was noted and allowed. In
338 course of defendants' testimony, the objection was withdrawn and the document received in evidence. Plaintiffs' Exhibit 63 is as follows:

Plainview, Texas

Statement of Estimated Annual Expense Including Proper Depreciation Charge.

Estimated Expense

Salaries:

General Superintendent (part time)	$1,500
Clerical help in office	2,400
Solicitor for new business	1,200
Line foreman	1,500
Line assistants (2)	2,400
Chief engineer at plant	1,800
Plant operators (3)	3,600
Plant maintenance labor	2,400
Total salaries	$16,800

Maintenance Expense:		
Plant maintenance materials	$2,700	
Line maintenance materials	1,500	
Total Maintenance Expense		4,200
Service Truck Operation and Maintenance		1,000
Commercial Expense:		
Printing, postage and office supplies	300	
Publicity and advertising	750	
Miscellaneous expense	1,500	
Total Commercial Expense		2,550
Fuel and Lubricating Oil:		
Fuel Oil (9.K.W.H. per gal.) 238,000 gal. @ 4½¢	10,710	
Lubricating Oil (1000 K.W.H. per gal.) 2140 gal. @ 50¢	1,070	
Misc. water, charts, etc.	500	
Total Fuel and Lubricating Oil		12,280
Insurance Expense:		
Premiums on fire, tornado and employees compensation and public liability	2,080	
		2,080
Total Operating Expense		38,910
Proper Depreciation		19,000
Uncollectible Accounts		4,850
Total Annual Expense Exclusive of Debt Service		62,760

339 Whereupon the witness resumed his testimony as follows: I have prepared a schedule showing the proper annual depreciation charge which should be made upon the proposed City plant in Plainview, Texas.

Whereupon the witness identified and there was offered and received in evidence as plaintiffs' Exhibit 64 a schedule reading as follows:

Plainview, Texas
Life Expectancies, Wearing Values,
Annual Depreciation
Sinking Fund Basis
Interest 2½%

Account	Assumed life in years	Assumed wearing value %	Annual Depreciation rate %	Annual depreciation rate corrected for salvage %	Investment $	Annual depreciation charge $
Structures	50	100	1.03	1.03	24,813	256
Oil engines and Auxiliaries	15	100	5.58	5.58	177,403	9,890
Electric plant equipment	20	90	3.91	3.52	15,882	560
Poles and fixtures	18	100	4.47	4.47	41,835	1,830
Overhead conductors	20	95	3.91	3.71	31,026	1,150
Transformers	20	98	3.91	3.83	27,839	1,060
Services	20	100	3.91	3.91	15,719	453
Meters, electric	15	98	5.58	5.46	30,131	1,640
Street lighting system overhead	15	100	5.58	5.58	7,290	405
Whiteway Street Lts.	15	100	5.58	5.58	23,529	1,320
Store room and garage	20	100	3.91	3.91	1,765	69
Office equipment	10	75	8.90	6.69	1,176	78
Autos and trucks	4	80	24.08	19.1	1,529	290
Total				4.76	399,937	19,001

340 Whereupon the witness resumed his testimony as follows: A property, such as the one in question, is composed of many units. Each one of those units starts out in a 100 per cent condition, and during its useful life the condition goes from a hundred percent down either to salvage or to nothing. The wiping out of the property and replacement of those units may start a week after the plant is built. For example, an automobile may run into a telegraph pole, or a fire may burn a meter. Any number of casualties may occur. A plant has to go on and operate in 100 percent operating condition in order to give service. In order to keep that plant in a 100 percent operating condition, money has to be ploughed back from source in order to maintain service. Plaintiffs' Exhibit 64, shows my opinion of the proper depreciation charged. It means that this sum of money is required to assure replacing units that have to be replaced, either from casualty or other causes, and to keep the integrity of the plant so that it can continue giving 100 percent operating service.

Direct examination—Resumed

Yesterday I testified that I had prepared estimates on prospective earnings for the proposed city plant, and prospective expenses. In the course of my professional practice, I am retained by clients to make such estimates for them—that is, estimates of future earnings and future expenses. There are very few projects that involve expenditures of money that do not also involve studies as to probable earnings and economic soundness. These estimates which I make for my clients are for the purpose of being used in the exercise of business judgment, and they are used in that way. In the application of the City of Plainview to the Public Works Administration, which is in evidence and is numbered Plaintiffs' Exhibit 25-A, on the bottom of page 7 and the top of page 8 is an estimate of the probable division of business between the proposed plant and the
341 company plant, also on pages 8 and 9 of the proposed gross dollar earnings and proposed operating expenses. The estimates which I testified yesterday that I had prepared, are of the same general character as the estimates contained in the application, and refer to the same items.

I have also computed the average annual cost over a period of 15 years for renewals and replacements of plant equipment upon the proposed Plainview project. My calculation on the requirements for proper depreciation and also renewals and replacements has been predicated upon the exact plant at Plainview, the type of plant involved, the character of its business, which will be a competing one with an existing company, and recognizing the fact that it must be maintained in a condition that will give competing service. The item of renewals and replacements represents the cost that would be necessary to keep the property in a condition that would give service.

Distinguishing between the renewals and replacements and the proper depreciation, the renewal and replacement figure would keep the plant in an operating condition but in a less efficient condition through its life and would not make possible additions and betterments that would keep the plant in step with advance in the art.

For instance, the engines might be quite obsolete before the end of their useful life, in which case if they were com-

peting with the private company, the private company no doubt would have the most efficient equipment throughout, and be able to render better and cheaper service. In my figure for renewals and replacements, I have nothing for the replacement of that engine by a more modern engine when it becomes obsolete. But I do have a figure in there which would replace a broken part of the engine or a cracked cylinder head. Perhaps my point would be plainer by this explanation: It would be possible to take a Model T.
342 Ford, for instance, and by renewing gaskets and boring cylinders out, once in a while, and putting on new fenders, and so forth, keep it so it would operate with practically the same service factor as that car did new. But it would not compare at all with a more improved unit, and would not have the same value at any time as a newer and more improved unit. My renewal and replacement figure is the amount necessary to keep that Model T. Ford operating as well as a Model T. Ford can operate. And the depreciation figure is the amount which would enable you, at the time the Model T. Ford became obsolete, to buy a new car. The annual cost over a period of 15 years, of renewals and replacements is $10,000 a year average.

I have prepared a statement of the annual expense which this proposed city plant would incur, including as one of the items, instead of a proper depreciation charge, a $10,000-a-year charge for replacements and renewals.

Whereupon the witness identified as his statement and there was received in evidence as Plaintiffs' Exhibit 65, a document reading as follows:

343 *Plaintiffs' Exhibit 65*

Plainview, Texas

Statement of Estimated Annual Expense Including Actual Replacements and Renewals Instead of Proper Depreciation Charge.

Estimated Expense:

Salaries:

General Superintendent (part time)	$1,500
Clerical help in office	2,400
Solicitor for new business	1,200
Line foreman	1,500

Estimated Expenses:		
Salaries:		
Line assistants (2)	$2,400	
Chief engineer at plant	1,800	
Plant operators (3)	3,600	
Plant maintenance labor	2,400	
Total salaries		16,80
Maintenance Expense:		
Plant maintenance materials	2,700	
Line maintenance materials	1,500	
Total Maintenance Expense		4,20
Service Truck Operation and Maintenance		1,00
Commercial Expense:		
Printing, postage and office supplies	300	
Publicity and advertising	750	
Miscellaneous expense	1,500	
Total Commercial Expense		2,55
Fuel and Lubricating Oil:		
Fuel oil (9 K.W.H. per gal.) 238,000 gal. @ 4½¢	10,710	
Lubricating oil (1000 K.W.H. per gal.) 2140 gal. @ 50¢	1,070	
Misc. water, charts, etc.	500	
Total Fuel and Lubricating Oil		12,28
Insurance Expense:		
Premiums on fire, tornado and employees compensation and public liability	2,080	
Total Insurance Expense		2,08
Total Operating Expense		38,91
Replacements and Renewals*		10,00
Uncollectible Accounts		4,85
Total Annual Expense Exclusive of Debt Service		53,76

*Minimum amount required to provide service to consumers.

344 I have a statement of the annual expense which this proposed city plant would incur, including as one of the items, instead of a proper depreciation charge, a $10,000-a-year charge for replacements and renewals.

Whereupon the witness resumed his testimony as follows: I am familiar with the terms of the contract dated December 4, 1935, between the Federal Emergency Administration of Public Works and the City of Plainview, and have prepared a table based upon the terms of that contract, showing accurately the annual requirements necessary for principal retirements and interest payments upon the amount of bonds contemplated by it.

Whereupon the witness identified as his table and there was received in evidence as Plaintiffs' Exhibit 66, a document reading as follows:

Plainview, Texas
Bond and Interest Table

Based on terms of contract between PWA and City, and assuming plant to be completed January 1st, 1937. Interest at 4% per annum

Year	Principal unpaid at June 1st	Principal payment June 1st	Amount of annual interest	Total annual payment
1937	$328,000	$10,000	$12,920	$22,920
38	318,000	15,000	12,420	27,420
39	303,000	20,000	11,720	31,720
40	283,000	20,000	10,920	30,920
41	263,000	20,000	10,120	30,120
42	243,000	20,000	9,320	29,320
43	223,000	25,000	8,420	33,420
44	198,000	25,000	7,420	32,420
45	173,000	25,000	6,420	31,420
46	148,000	25,000	5,420	30,420
47	123,000	30,000	4,320	34,320
48	93,000	30,000	3,120	33,120
49	63,000	30,000	1,920	31,920
50	33,000	33,000	660	33,660

345 Plaintiffs' Exhibits 62-66, inclusive, show quite conclusively that the project would not be economically sound or self-liquidating. The probable revenue

would fall considerably below the operating expenses plus debt service and proper depreciation. They even fall below the figures based on simply replacements and renewals required to keep the plant operating. The proposed plant could not even pay the interest charge on the proposed bonds after paying operating expenses, including therein renewals and replacements.

Cross Examination

Plaintiffs' Exhibit 66 for identification, which is the Bond and Interest Table prepared by me, shows that I start out with a loan of $328,000; and Plaintiffs' Exhibit 61, which is the estimate of the cost of the project proposed by the City, shows my estimate of the cost of building that plant as $399,938. I have not always had the opinion that that would be the cost. On January 19, 1935, I indicated that the cost would only be $339,462. The earlier estimate was made in connection with an investigation at the time of the company's protest, a year or more ago. It was made on rather meager information. Since that time we have had complete specifications, and also prices have changed some—and, therefore, I have now a different estimate. I do not mean that the cost of materials and labor necessary to go into this plant has increased from January 19, 1935, to the present date in the amount of $60,000. There is a decided difference in the quantities involved in the two estimates. One item, I remember, alone, the meters, was almost doubled—$15,000 for additional meters that the specifications called for, that we did not have included in the units in the first estimate. Both estimates were based on the P. W. A. requirement as to wages, which I understand at present to be the same as in January of 1935. If that understanding is incorrect to a material extent, my
346 present figures would be incorrect to a material extent. For the reasons stated, I prepared a report as an expert in January, 1935, to be used in a protest made to the Administrator, in which I named a figure of $339,462 as indicating to the Administrator that he was making too large a loan and grant to the company; but since then, and since this litigation has begun, I have revised my figures so as to increase that by $60,000. I was willing to have someone rely on the figures prepared in January, 1935.

We made estimates based on the best figures we had; and I had made it clear at the time—that it was based on such figures. When I was preparing a report in January, 1935, I discussed the matter with Mr. H. L. Allen, vice-president of the Texas Utilities Company, who has testified in this case. I do not know whether he made an estimate or had referred to an estimate of the cost of the property, in a communication addressed to the Administrator. I do not recall whether he discussed with me an estimate by him of the cost of constructing this plant. I do not remember his using a figure of the cost of this plant as being not to exceed $270,000. I did not talk to him frequently about this matter. I had a conference with him, I think, one afternoon, the purpose of which was to obtain operating data and other physical data at Plainview. It was not suggested to me by anybody that the figure I used in January, 1935, should be revised. I found that the quantities on which the estimate in 1935 had been based, differed from those actually called for in the specifications prepared for the City. Those specifications were not attached to the application of the City, which I saw before. I did not see specifications at the time the estimate of 1935 was made. I had the application itself, but not the specifications. I estimated the cost without knowing what the specifications were. We were asked to prepare an estimate of what the probable cost of a municipal plant would be in Plainview. And we made an
347 estimate based on our general information as to what a plant of that type would cost.

Since that time we have had access to the detailed specifications. The quantities that we used and the type of material we used differed from the ones in the specifications. And this present estimate is based on the exact quantities, as near as we have been able to tell from the present specifications and the present prices, as based on the plant proposed by the City.

Assuming your hypothetical case regarding depreciation, if a company built a plant, with $200,000 of its own funds and $800,000 of borrowed money, and thereafter kept its maintenance up, and out of the earnings, repaid the entire $800,000 and interest, and also built up a fund of $200,000, I do not propose that it should also have built up a fund equal to the $800,000.

The ordinary maintenance charge includes simply maintenance. Now, the minimum amount of money that would have to be used to keep that property in operating condition would be the cost of the maintenance items plus these renewals and replacements required to keep the property in condition so that it can give service.

You do not have, with this depreciation fund, the two funds at the end of the life of the property. And without this depreciation, it is impossible to keep it in an operating condition. Depreciation should take care of the maintenance and the renewals and replacements plus obsolescence and inadequacy and so forth—the entire thing. That is one fund. The alternative fund is the strictly renewals and replacements, which is a sum above the ordinary maintenance charge which is actually required to keep the property operating. The property made up of a lot of composite units reaches a point, so far as physical condition is concerned, below which it cannot go and still give service. It is maintained at that approximately level line of physical
348 condition by plowing back money for renewals and replacements and other things that cause deterioration of the property and diminution in value. And that is the depreciation fund I am talking about. You would not have a fund of dollars. Most of that money would be plowed back into the property, to keep it up and keep it operating. You ought to have enough money to equal the amount of accrued depreciation of that property. I would say the proper depreciation fund would probably have on hand at that time approximately $150,000. And the plant would be worth $850,000 at that time. You would have a paid-for plant.

If I suppose two companies, one of which invests of its own money a million dollars in constructing a plant, and the other of which borrows $800,000 and invests of its own funds $200,000; and if the second company pays out of the earnings of the property the $800,000 and interest thereon, I would not say that the two companies, at the end of that period, should have on hand identically the same amount of money and property. The one would have to put out a good deal more money during that period, to keep the plant operating, than the other one would, on account of the fact that it is paying off its security obligation, plus actual re-

quired expenditures without which the plant could not operate. The depreciation funds should be the same.

Redirect Examination

The estimate of the cost of the proposed plant which was submitted in January, 1935, was prepared on the basis of the application of the City, which is Plaintiffs' Exhibit 25-A, I believe, and the amended application, which is Plaintiffs' Exhibit 25-B. Those two documents describe in some detail the plant which the City wishes to build. We obtained some local information in addition to that application. But the application and the information obtained locally were the background of our study. I have since seen a
349 document prepared by the city engineers giving the full plans and specifications. That document was in existence at the time I made this estimate. I asked for the specifications, but they were non-available to me. The description of the plant in the application and the amended application might be fulfilled by one of several plans or specifications. I prepared the first estimate on the basis of the minimum plant which the City would require to do the business. When I saw the plans of the city engineers, I found that they were in excess of the minimum requirements. The present estimate is based on a little better type of pole than we first figured on; more equipment in the plant than we had figured on. The City has designed a better and more elaborate plant than the one on which I made my first estimate. There have been price changes. I included some things in the second one which I did not include in the first. The difference between my present estimate and that made a year ago, is that the present one is made on the City's specifications, which call for a more elaborate plant; it is due to price changes; and it is due to additional items' being put in.

In determining labor costs in both estimates, I used a document signed by Julian Montgomery, State Engineer, Public Works Administration. The caption is "Article IV, Federal Emergency Administration of Public Works, Fort Worth Division, Labor Classification and Minimum Wage Scale." The prices we used are taken from that wage scale. Whereupon a document entitled Article IV, Federal

Emergency Administration of Public Works, Fort Worth Division, Labor Classification and Minimum Wage Scale, was identified by the witness and received in evidence as Plaintiffs' Exhibit 67.

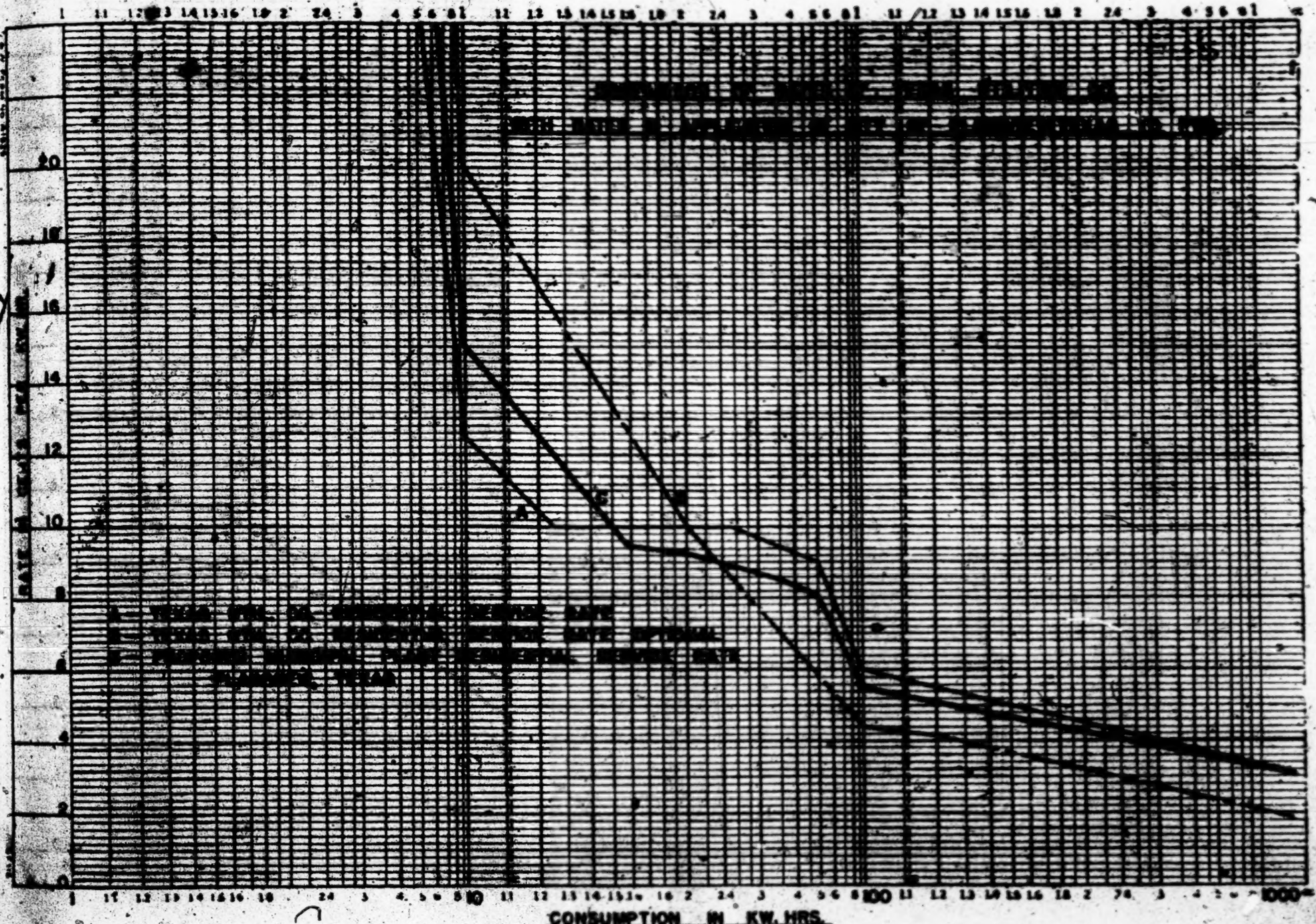
My estimate of renewals and replacements was my estimate of that sum necessary to keep the plant operating—not taking into account items for obsolescence or falling
350 off in efficiency. Now, the second figure of depreciation is to keep the plant running as efficiently as an electric light plant can run. A depreciation charge is not for the purpose of building up a sum of money to have at the end, but for the purpose of keeping the plant continually modern and efficient.

Donald A. Henry was called as a witness for and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

I live in New York City. I am rate and valuation engineer for Stone & Webster Service Corporation, of New York City, which has a contract for management with Texas Utilities Company—no other interest than that. I am an engineer. I was graduated in the year 1909 from the University of Illinois, College of Electrical Engineering. I spent one year in the shops of the Westinghouse Company, on design and construction of electrical machinery; then taught at the Electrical Engineering College of the University of Illinois; then worked for the Sanitary District of Chicago, in the operation of electric substations and its 40,000-horsepower power station, at Lockwood, Illinois. I then took charge for the Illinois Traction System of power sales, contracts, meter testing, meter reading, and customer relations. This was wholesale business conducted mostly with municipalities and small distribution companies. Following this I spent 12 years with the now Illinois Commerce Commission, the latter half as chief engineer, engaged in inventory and appraisal work, rate studies, service investigations, the drafting of orders, and general advisory work for the Commission. For the last 8 years I have been rate and valuation engineer with the Utilities Power and Light Corporation

PLAINTIFFS' EXHIBIT 68



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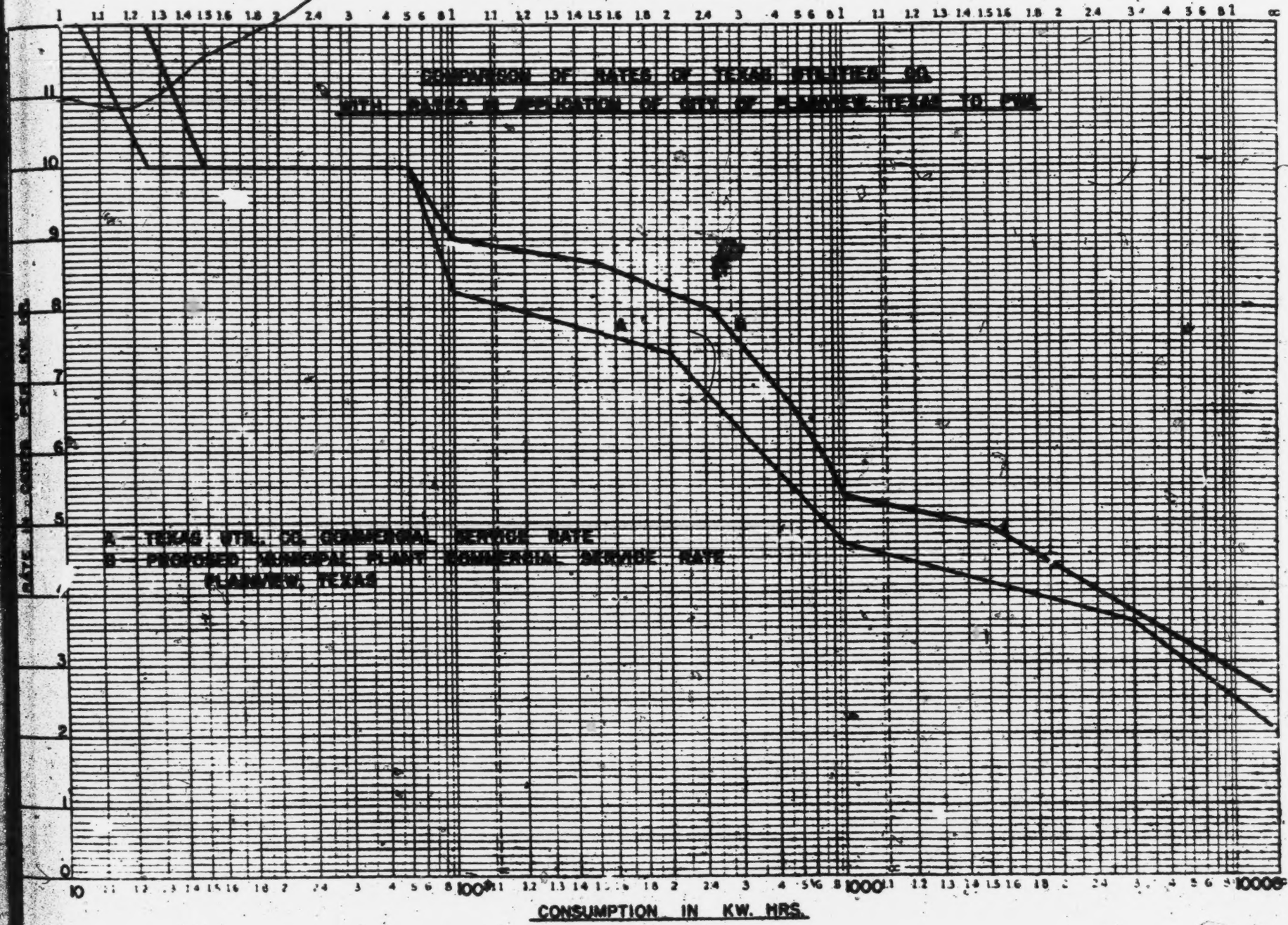
PLAINTIFFS' EXHIBIT 69



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of Chicago, Consolidated Electric and Gas Company
351 of New York, and Stone & Webster Service Corporation of New York, doing supervisory work in rate cases, inventories, valuation, rate studies, and consultative work for some 250 operating companies. I am familiar with the rates which are now in effect in Plainview, Texas, by the Texas Utilities Company, and with those proposed in the application of the City of Plainview for a loan and grant. I have prepared two graphs showing the exact relation of the two residential rates and the two commercial rates in all brackets. Whereupon the two graphs were received in evidence as Plaintiffs' Exhibit 68 and Plaintiffs' Exhibit 69.

(Here follows exhibits marked pages 351 and 352.)

353 I have made several studies over the last two or three years of the local consumption of electricity in Plainview, Texas, including consumer accounts of the Texas Utilities Company. I paid considerable attention in the last 10 years to the factors entering into the division of business, where a municipal plant competes with a private utility. I believe that under the conditions as reflected on the graphs I have shown to you there, and other operating conditions which I have taken into account, that the city plant will, over the average of a number of years get all of the street-lighting revenue and half of the remaining revenue, exclusive of the water pumping, which I think the company would continue to get under present conditions down there. Based upon the actual amount of business which Texas Utilities did in Plainview in 1935, the amount of gross revenue accruing to a municipal plant under the conditions we have outlined here, would be $69,372. I am very familiar with the factors which go into the operating expenditures of an electric utility, and have made a study of the conditions past and present in Plainview, Texas, bearing on the possible growth of electric use over the next 15 years. I have prepared an estimate showing, for the first, fourth, ninth, and fourteenth years, over the next 15-year period, the estimated gross revenue of the proposed municipal system and the estimated operating expenses, one such estimate includes as an item of cost a proper depreciation charge and another

such estimate includes instead a charge for replacements and renewals.

Whereupon these documents were marked as Plaintiffs' Exhibit 70 and 71 for identification, respectively.

I had available Mr. Veatch's estimate of the operating expenses of this plant and the specifications of the plant, showing what type of plant it was and its condition in operation. And I studied those independently of Mr.
354 Veatch, to assure myself that I thought the quantities used there are reasonable. And I believe they are.

So I adopted Mr. Veatch's estimate of cost of operation for the first year, in this tabulation. For the subsequent years I have made changes because I think the business in Plainview will increase over a period of years, and necessarily the operating cost of the city plant will increase. In estimating the possible increase in business, I have taken into consideration increase in population, increased use of electricity per customer, reductions in rates.. I think the estimates are correct.

Whereupon the estimates referred to were received in evidence as Plaintiffs' Exhibits 70 and 71, respectively, reading as follows:

355 *Plaintiffs' Exhibit 70*

Plainview, Texas

Estimate of Operating Results—Proposed Municipal Plant

	Operating Year			
	Base	Fourth	Ninth	Fourteenth
Gross Revenue	$69,372	$75,940	$81,000	$84,590
Expense				
General Superintendence	1,500	1,600	1,800	2,000
Clerical Help	2,400	2,500	2,700	3,000
Solicitors of New Business	1,200	1,500	1,800	2,400
Line Foreman	1,500	1,600	1,800	2,000
Linemen	2,400	2,700	3,000	3,300
Chief Engineer	1,800	2,000	2,200	2,400
Watch Engineers	3,600	3,900	4,500	4,800
Plant Mtce. Materials and Labor	5,100	5,740	6,230	6,620
Line Mtce. Material	1,500	1,700	1,840	1,960
Commercial Expense	2,550	2,610	2,645	2,680
Service Truck Oper. and Mtce.	1,000	1,100	1,200	1,300
Lubricating Oil	1,070	1,280	1,510	1,790
Fuel Oil	10,710	12,600	14,750	16,680
Miscellaneous Plant Expense	500	600	800	1,000
Insurance	2,080	2,100	2,150	2,200
Proper Depreciation	19,000	19,000	19,000	19,000
Uncollectible Accounts	4,850	5,320	5,675	5,920
Total	$62,760	$67,850	$73,600	$79,100
Debt Service Requirement		30,920	31,420	33,660
Total Expense		98,770	105,020	112,760
Deficit		*22,830	*24,020	*28,170

*Red

356 *Plaintiffs' Exhibit 71*

Plainview, Texas

Estimate of Operating Results—Proposed Municipal Plant

	Operating Year			
	Base	Fourth	Ninth	Fourteenth
Gross Revenue	$69,372	$75,940	$81,000	$84,5[illegible]
Expense				
General Superintendence	1,500	1,600	1,800	2,0[illegible]
Clerical Help	2,400	2,500	2,700	3,0[illegible]
Solicitors of New Business	1,200	1,500	1,800	2,4[illegible]
Line Foreman	1,500	1,600	1,800	2,0[illegible]
Linemen	2,400	2,700	3,000	3,3[illegible]
Chief Engineer	1,800	2,000	2,200	2,4[illegible]
Watch Engineer	3,600	3,900	4,500	4,8[illegible]
Plant Mtce. Materials and Labor	5,100	5,740	6,230	6,6[illegible]
Line Mtce. Material	1,500	1,700	1,840	1,9[illegible]
Commercial Expense	2,550	2,610	2,645	2,6[illegible]
Service Truck Oper. and Mtce.	1,000	1,100	1,200	1,3[illegible]
Fuel Oil	10,710	12,600	14,750	16,8[illegible]
Lubricating Oil	1,070	1,280	1,510	1,7[illegible]
Miscellaneous Plant Expense	500	600	800	1,0[illegible]
Insurance	2,080	2,100	2,150	2,2[illegible]
Replacement & Renewals	10,000	10,000	10,000	10,0[illegible]
Uncollectible Accounts	4,850	5,320	5,675	5,9[illegible]
Total	$53,760	$58,850	$64,600	$70,1[illegible]
Debt Service Requirement		30,920	31,420	33,6[illegible]
Total Expense		$89,770	$96,020	$103,7[illegible]
Deficit		*$13,830	*$14,960	*$19,1[illegible]

*Red

357 Whereupon the witness resumed his testimony as follows:

I have prepared two statements showing for each year of the 15 years of operation of the proposed plant the estimated gross revenue and the estimated total expense, including the debt charge of the company, the first table based on a proper depreciation charge, and the second table based on a charge for replacements and renewals.

Whereupon two statements were identified by the witness and received in evidence as Plaintiffs' Exhibits 72 and 73, respectively, reading as follows:

Plainview, Texas

Plaintiffs' Exhibit 72

Summary of Operating Results—Proposed Municipal Plant.

Proper Depreciation Basis.

Operating Year	Gross Revenue	Total Expense	Deficit
1st	$72,220	$87,520	$15,300
2nd	73,520	93,020	19,500
3rd	74,720	98,420	23,700
4th	75,940	98,770	22,830
5th	77,140	99,170	22,030
6th	78,240	99,570	21,330
7th	79,240	104,820	25,580
8th	80,190	104,950	24,760
9th	81,060	105,020	23,960
10th	81,860	105,120	23,260
11th	82,610	110,120	27,510
12th	83,330	110,020	26,690
13th	83,940	109,920	25,980
14th	84,590	112,760	28,170
		Accumulated Deficit	$330,600

*Red Figures.

358 *Plaintiffs' Exhibit 73*

Plainview, Texas

Summary Operating Results—Proposed Municipal Plant.

Replacement & Renewal Basis

Operating Year	Gross Revenue	Total Expense	Deficit
1st	$72,220	$78,520	$6,300
2nd	73,520	84,020	10,500
3rd	74,720	89,420	14,700
4th	75,940	89,770	13,830
5th	77,140	90,170	13,030
6th	78,240	90,570	12,330
7th	79,240	95,820	16,580
8th	80,190	95,950	15,760
9th	81,060	96,020	14,960
10th	81,860	96,120	14,260
11th	82,610	101,120	18,510*
12th	83,330	101,020	17,690
13th	83,940	100,920	16,980
14th	84,590	103,760	19,170
		Accumulated Deficit	$204,600

*Red Figures.

The witness resumed his testimony as follows:

Plaintiffs' Exhibits 70 and 71 show my estimates for the fourth, ninth, and fourteenth years of a 14-year period. The Plaintiffs' Exhibits 72 and 73 show each year of a 14-year period. The fourth, ninth, and fourteenth years on the last exhibits are identical with the two previous exhibits, but they give only total gross revenue and total expense. I have estimated the intervening years in these later tables by drawing a smooth curve between the points indicated as the fourth, ninth and fourteenth years, those three years having been estimated in detail. I have not made a detailed estimate for each year.

Plaintiffs' Exhibits 72 and 73 set up over a 14-year period gross revenue, total expenditures, including all the

interest and amortization as required by the contract between the City of Plainview and the Government, and then show a deficit for each year, and the accumulated deficit over a 14-year period.

Whereupon, instead of prolonging the examination
359. of this witness, counsel for the defendants and counsel for the plaintiff agreed that the plaintiff Texas Utilities Company would suffer substantial financial loss through the establishment and operation of this municipal plant, and also that the plaintiff Texas Utilities Company has exhausted its administrative remedies.

Cross Examination

My estimate is based on the maintenance of approximately equal rates by the two plants, which is the case that you have, on an average, over a number of years, in almost every municipal venture. It would not affect my estimate to assume that the City of Plainview, after the establishment of its own plant, were able to fix a minimum rate so as to prevent the power company from charging less than the city plant would charge.

Whereupon the following documents were received
360 in evidence.

Plaintiffs' Exhibit 75

November 22, 1934.

Judge C. S. Williams
City Attorney
Plainview, Texas

My dear Judge Williams:

This will acknowledge receipt of four copies of an amortization table, four copies of additional financial data, and list of proposed consumers for the light and power system which you propose to construct under our Docket No. 8021 should an allocation be made for this purpose.

We have issued the necessary instructions to have this additional information forwarded to our examining divisions for appropriate consideration.

Sincerely yours,

A. M. FEREBEE
For the Administrator

Plaintiffs' Exhibit 76

Wichita Falls, Texas
November 15, 1934
Judge C. S. Williams, City Attorney

Plainview, Texas
Docket No. 8021
Plainview Light and Power System
Engineer's Reference No. 417

Dear Judge Williams:

Pursuant to your request we are submitting schedules of estimated income, amortization, operating expenses and maintenance and depreciation based on your latest information obtained by signing up of users of electric
361 energy in your city.

Very respectfully yours,

JOE E. WARD
successor to
MONTGOMERY & WARD
CONSULTING ENGINEERS
(signed) BY John B. Upchurch

Plaintiffs' Exhibit 77

Washington, D. C.
November 27, 1934.

Mr. Henry T. Hunt,
Chairman, Electric Power Board,
Washington, D. C.

My dear Mr. Hunt:

Re: Docket No. 8021
Engineers Reference No. 417
City of Plainview, Texas.

In conversation with some of the examiners concerning the above matter, it appeared that we should submit something definite in regard to how the City of Plainview would provide its water supply—wells, pumps, etc.—in the event the city cancelled the contract it now has with the Texas Utilities Company for pumping its water.

The City of Plainview will have no difficulty in providing its own water supply and the machinery for operating

same; but since we are filing a short supplement amongst the papers of the docket, we are dealing with that matter under subdivision 3 of this supplemental brief, which is attached to this letter, and respectfully ask that you refer to such subdivision 3 for the full details as to how the city will finance and provide for its water supply.

362 Yours very truly,

(signed) C. S. Williams
C. S. Williams,
City Attorney of the City of
Plainview, Texas.

Plaintiffs' Exhibit 78

Mr. Henry M. Hunt, Chairman,
Electric Power Board, PWA.,
Washington, D. C.

Re: Docket No. 8021 Engineering Reference No. 417, Application of City of Plainview, Texas, for loan and grant for electric power plant.

Dear Mr. Hunt:

I, with other representatives of the City of Plainview, was in Washington some two weeks ago in regard to the above docket matter. We had a conversation with Mr. Rau in regard to same and he suggested that it might be well to file a further and more detailed statement of the expected cost of the distribution system.

After some delay we have just received from Mr. Ward, successor to Montgomery & Ward, who as engineers prepared the plans and specifications for the power plant and distribution system for the City of Plainview, a detailed estimate of the cost of the distribution system, and four copies of same are handed to you herewith which please file amongst the papers referring to the matter.

The suggestion for this additional information was made by Mr. Rau because we, while in Washington, filed evidence showing that the city would receive a much larger proportion of the electric business in Plainview than had been claimed the city would receive in the original applica-

tion so that the cost of the distribution system
363 might be larger than set out in the original application. The estimate of cost which we herewith hand you aggregates the same amount as set out in the original application, that is, $159,520.00

Yours truly,

WILLIAMS & DAY
(signed) BY C. S. Williams

Plaintiffs' Exhibit 79

January 7, 1935

Mr. Grady Shipp
Plainview, Texas

Retel December 17 and December 21 Re-Docket Eighty Twenty One. Favorable Reports from Examining Divisions. Allocation Dependent on Availability of Funds.

PHILIP B. FLEMING

Plaintiffs' Exhibit 80

January 17, 1935

Honorable Herbert Dysart,
Mayor pro tem.,
Mr. C. S. Williams,
City Attorney,
Plainview, Texas.

Dear Sirs:

In reply to your letter of January 1 relative to the application of Plainview, Texas, for a loan and grant to finance construction of an electric generating plant and distribution system, Docket No. 8021:

The Electric Power Board of Review and the several examining divisions of the Public Works Administration have recommended that the application be approved.
364 However there are at present no funds available for an allotment. If and when funds become available the project will be put on the agenda for favorable action.

Very truly yours,

HENRY T. HUNT
Chairman
For the Administrator

Plaintiffs' Exhibit 81

Plainview, Texas,
February 11, 1935.

Mr. O. M. Rau, Examiner,
Electric Power Review Board,
c/o Public Works Administration,
Washington, D. C.

Re: Docket No. 8021,
Engineer's Reference No. 417,
City of Plainview, Texas.

Dear Mr. Rau:

You will doubtless recall the writer as one of the three Plainview representatives who called on you during the latter part of November in connection with the above pending application. And inasmuch as it was our understanding that the Texas Utilities Company would be given an opportunity to reduce rates to a point acceptable to the Power Board and failing so to do the application would in all probability be favorably disposed of in accordance with the approval of the Legal, the Engineering and the Finance Divisions of the PWA. And since we have something like fifteen hundred persons on the relief rolls here in Plainview and we have hoped all along that the construction and installation of the municipal power and light plant would, to a very large extent, take care of our unemployment
365 problems, we are taking the liberty of addressing you on the subject at this time.

The entire Plainview delegation was deeply impressed with the frank and courteous consideration shown us by everyone with whom we came in contact, and knowing the problems with which you and your board are confronted we have hesitated to make inquiry concerning the reasons for the delay and the present status of the application but, for the reasons stated, we are really facing a serious problem that cannot well be disposed of in an intelligent manner until we are advised as to when we may expect information along the lines indicated.

We wish to make it clear that we are not asking for information to which we are not entitled but at the same time

our situation is so serious that we will deeply appreciate anything that will enable us to know how to proceed.

Yours very truly,

(signed) Herbert Dysart
Alderman and Mayor Pro Tem

Plaintiffs' Exhibit 82

November 12, 1935

The Mayor,
City of Plainview,
Hale County, Texas.

Re: Docket No. 8021
Applicant: City of Plainview
Project: Power Plant

Dear Sir:

There are enclosed herewith the following:

1. Five unexecuted counterparts of an Agreement terminating the Loan and Grant Agreement between the City of Plainview and the United States of America, dated as of August 17, 1935.

2. A Contract Record Memorandum containing
366 suggested forms of the proceedings required for the approval and execution of the Agreement. Such forms must, of course, be adapted to the facts and the law of this case.

3. An executed original and two conformed copies of an Offer made by the United States of America to aid in financing the construction of the above mentioned project, by making a loan and grant to the City. The United States of America will purchase bonds and make a grant in the amounts therein specified upon a showing that the City has complied with the provisions of PWA Circular A.

4. Two copies of said PWA Circular A (PWA Form No. 191, September 18, 1936).

5. Three copies of Form PW-L-42 (10-28-35). Form PW-L-42 should be completed in duplicate by a duly authorized officer as soon as the facts warrant, and should be returned in duplicate to the Public Works Administration, Washington, D. C., marked for attention of the Legal Division.

Three counterparts of the enclosed Agreement should be executed under seal by the proper officers and sent to the office of the State Director (PWA) together with the Contract Record in triplicate. The officers should not date the enclosed Agreement. Two copies of the enclosed Agreement need not be executed or returned. The three executed counterparts of the enclosed Agreement, together with the Contract Record in triplicate, will be forwarded by the State Director to the Administrator. The Agreement will be executed on behalf of the United States if the Contract Record is complete. The three executed counterparts of the Agreement will be dated and one executed counterpart will be returned to you.

As for the Offer, there should be no formal acceptance by resolution or ordinance. The Offer is conditioned upon performance rather than upon a promise to perform.
367 Briefly, the Offer, plus performance according to its terms, will constitute an unilateral contract.

We advise you, however, that our ability to perform pursuant to the terms of the Offer is limited by the litigation now pending in the District of Columbia, and that we must govern ourselves in accordance with the preliminary injunction granted by the Supreme Court of the District of Columbia until the issues in such litigation are determined, and thereafter in accordance with such final order as may be entered.

Prompt acknowledgment of this letter and enclosures should be made to the State Director. If anything is not clear or if any difficulties arise, please communicate with the office of the State Director "Attention Legal Section" at once.

Sincerely yours,

DAN H. WHEELER,
Assistant to the Director,
Legal Division.
For the Administrator

Enclosures

Plaintiffs' Exhibit 83

Washington, D. C.
December 5, 1935.

The City Clerk,
City of Plainview, Texas.

Re: Docket Number: PWA 8021
Applicant: City of Plainview, Texas.
Project: Power Plant.

Dear Sir:

Enclosed herewith are an executed original and two conformed copies of an Offer made by the United States of America to aid in financing the construction of the
368 above captioned project by making a loan and grant to the Applicant, and an Acceptance Record Memorandum containing suggested forms to be followed by applicants in accepting an offer of the Government to aid, by way of loan and grant, in financing the construction of a Public Works project. Such forms must, of course, be adapted to the facts and the law of this case.

Three certified copies of the resolution or ordinance accepting the Government's offer and three certified copies of the minutes of the meeting at which such resolution or ordinance was passed should be forwarded promptly to the office of the State Director (PWA) plainly marked "Attention: Legal Section".

This Offer supersedes the Offer dated November 9, 1935, which was previously forwarded to you. Please return the Offer of November 9 along with the acceptance proceedings of the enclosed superseding Offer.

Prompt acknowledgment of this letter and enclosures should be made to the State Director. If anything is not clear or if any difficulties arise please communicate with the office of the State Director "Attention: Legal Section" at once.

Sincerely yours,

DAN H. WHEELER,
Assistant to the Director,
Legal Division.
For the Administrator

Enclosures

Plaintiffs' Exhibit 84

December 7, 1935

City Clerk
City of Plainview Texas

Re Docket Fighty. Twentyone Power Plant Stop Please Execute Terminating Agreement Forwarded to
369 You November Twelve If You Have Not Already Done so Prior to Accepting New Offer Dated December Four Stop Prompt Action Necessary and Names of Officials Executing Documents

CLARK FOREMAN
Director Power Division
For the Administrator

370 **R. B. Mac Donald** called as a witness on behalf of the plaintiffs and being duly sworn testified as follows:

I am the President of the Iowa City Light and Power Company and have been such for approximately nine years.

My experience in the operation and management of electric utilities dates from 1899 and has been continuous since that time in various capacities. At the present time I am President and General Manager of the Peoples Power Company operating in Rock Island, Moline and East Moline, Illinois, and contiguous territory, and am President of the Peoples Light Company operating in Davenport (Iowa) and contiguous territory. I am also President of the Iowa City Light and Power Company, which operates in the City of Iowa City, Iowa, and a few other smaller towns.

Rock Island and Moline, Illinois, and Davenport, Iowa, are separated by the Mississippi River and are distant about sixty miles from Iowa City. There is no physical connection between the plants and distribution systems in the tri-city area and Iowa City. There is a connection by way of stock ownership between the several independent companies that operate in those different territories. My connection is as President of the Iowa City Company and as President and General Manager of the Peoples Power Company at Moline.

I have been familiar with the situation in Iowa
371 City with reference to the Iowa City Light and Power Company properties in a general way since 1912. I was more definitely familiar with it from 1920 on and I have been President since 1927.

Iowa City has a population of substantially 16,000. It is the seat of the University of Iowa. There are very few industries—practically no industries located in Iowa City or nearby.

Iowa City is in Johnson County which is entirely inland and away from the borders of the state. The business of the Iowa City Light and Power Company is entirely confined to Johnson County. It renders gas and electric service in Iowa City, gas and electric service in Coralville, and gas and electric service in University Heights, comparatively small towns immediately contiguous to Iowa City, and, in addition, it renders rural service in territory immediately contiguous to Iowa City in Johnson County. Roughly speaking, the rural distribution lines of the Iowa City Light and Power Company extend about seven miles into rural territory. The other municipalities, University Heights and Coralville, are very much smaller than Iowa City, Coralville having a population of about 250 and University Heights about 150 or 200. The Iowa City Light and Power Company is the only electric company operating in Johnson County. It has power generating stations lo-
cated in Coralville on the Iowa River. It has a small
372 hydro plant and a steam power plant and it has a connection for purchased energy. It has a gas plant located in Iowa City and there are distribution systems in connection with both the electric and gas plants.

The company has approximately 150 miles of wire line in Iowa City and approximately 50 miles outside of Iowa City, including the towns of Coralville and University Heights and the rural areas. It has approximately 5,500 electric customers and approximately 300 of these are in the towns of Coralville and University Heights and the rural area.

In the electric department the company has a capacity in Iowa City of 6,760 kilowatts. That is its generating capacity. The maximum load that has been created on the sys-

tem is 2880 kilowatts, and we have capacity altogether for more than double the maximum load that has occurred up to this time. That maximum load occurred on October 27, 1934.

Of the total sales to residential customers of the company for the first three months of 1936, 95.4 per cent were sales to residents in Iowa City and 4.6 per cent were sales to customers outside Iowa City. In the commercial classification 99.6 per cent were sales to customers in Iowa City and 0.4 per cent were sales to customers outside Iowa City.

The total gross revenue of the electric department for the year 1935 was $321,963.04. For that same year the operating expenses of that department were $230,803.22.

373 The net revenue after deduction of operating expenses was the difference, which amounts to $91,159.82.

The company possesses franchises granted by the Board of Supervisors and approved by the Board of Railroad Commissioners for its service in the county outside of Iowa City. It has existing franchises in the towns of Coralville and University Heights.

Its franchise in the City of Iowa City expired on the 13th of January, 1934. There has been no notification to the company to cease rendering service or to remove its property from the streets and public places of the city since January 13, 1934, and the company is still serving the community. It renders service to the municipality itself as distinguished from the inhabitants which consists of street lighting, among other things. It also has a contract with the city for furnishing the electric power for use in connection with the municipality owned sewage disposal plant.

The company has approximately 75 employees in its two departments. Some employees' work is common to both departments, and I would say that 45 employees might be allocated to the electric department and 30 to the gas department. This does not include employees on construction work or anything other than the normal, ordinary and continuous operation.

For the year 1933 (payable in 1934) the company's Federal income tax was $15,865.35, and for the year 1934, paid in 1935, $6,774.56. I do not have the exact figures on the

income tax for the year 1935 payable in 1936 but the first quarter was approximately $5,000.

The company paid a Federal capital stock tax for
374 1934 amounting to $840 and in 1935 to $824.

The company pays the 3 per cent energy tax on electricity sold by it and has done so since the law requires it to be borne by the company rather than the consumer. The amount of tax in 1933 paid by the company was $2,868.23; for 1934 it was $7,286.40; and for 1935 $7,591.18.

The local taxes for state, county and city purposes, which in Iowa are collected together through the County Treasurer, were for 1933 $27,042.30; for 1934 $26,785.21; and for 1935 $23,580.19. These figures do not include any amount for the state sales tax which is paid by the company but which is actually a tax upon the consumer.

The Iowa City Light and Power Company has been in continuous operation of its plant and system in Iowa City since 1912. The approximate investment of the company in its electric plant and electric distribution system at Iowa City is $1,700,000. That means the approximate investment in the physical plant of the electric department. That is the reproduction cost new. The present value depreciated is approximately $1,500,000.

The effect of the company's being deprived of the right to operate the electric department on the cost of rendering service in the gas department would be to increase the cost in general and in commercial and new business expenses particularly. Take for example the matter of reading meters. The same men read both the gas and electric
375 meters when they call at the customers' homes. Part of that expense, of course, is allocated to the electric department. If a man is obliged to make the trip around to read just the gas meter, the cost per unit for reading just the gas meters would be more. In the matter of preparing bills we use combination bills that show the consumption for both gas and electricity. The same personnel handles that entire work. Of course, if the electric were dropped out, it would cost more per unit or thousand feet. The same thing is true with reference to management, supervision, insurance, and items of that kind, where either the facility or the work is devoted to the two departments and the cost

is split or divided between the two departments proportionately.

The local body which has jurisdiction of the fixing of rates for electrical service and utilities in Iowa is the City Council. The last time it regulated the rates of this company was in July of 1934. There had never been a rate ordinance in Iowa City prior to that that I know of.

Question: Can you tell us briefly the history of the rates for electricity in Iowa City from, say, 1920 to date, with respect to the trend and the percentage that they are today of what they were in, say, 1920 or 1926?

Mr. Holtzoff: We object to that as irrelevant.

The Court: I think that I sustained that objection
376 before. To my mind the important thing is that this company is a company whose rates are regulated by some public authority. So far as I can see, that is the material thing. Whether they have been going up or down depends upon a great many really collateral matters, but it is a company whose rates are fixed and regulated by some public authority.

Mr. Cook: Of course, the witness has testified that the city council has the authority to regulate rates. As
377 far as he has testified, and, I think, as far as the recognized facts are concerned, the rates have never been regulated in Iowa City except on this one occasion in July. In other words, they have usually been put into effect and acquiesced in. But we are offering this evidence, and we now offer to prove by this witness, that since 1926 the average cost of electricity in Iowa City, by reason of several reductions in rates to which he would specifically testify, made voluntarily by the company, has decreased 52 per cent. We make that as an offer of proof. I understand that your Honor sustained the objection before on this line of testimony.

The Court: It does not seem to me to have any relevancy. I will sustain the objection and allow you an exception.

I am familiar with the electric rates over the State of Iowa, and in the general portion of the State where Iowa City is located, and in cities of approximately the same population and situation.

Question: I will ask you, Mr. MacDonald, to state how

the rates in Iowa City, and the average cost of electricity there, compare with cities of similar population in the State of Iowa, and in the general vicinity of Iowa City.

Mr. Scott: To which we object, for the reason that it is collateral and irrelevant.

The Court: I will sustain the objection.

Mr. Cook: We offer to prove by the witness that the rates in effect in Iowa City are lower than the rates in any city in Iowa of comparable population, that is, in the neighborhood of 15,000 to 16,000 people.

The Court: I will sustain the objection. I do not
378 see that it has anything to do with the issues here.

Mr. Cook: For the record, we preserve our exception to the ruling.

Counsel for plaintiffs thereupon asked the witness whether there had been any complaints or any proceedings or whether he had ever been approached by the city with respect to any inadequacy of the service which the company had rendered. Counsel for defendants objected upon the ground that it was irrelevant. The court overruled the objection, to which defendants duly noted an exception.

The city has never questioned the adequacy of the service of the company. No one has ever brought any proceeding in which it was contended that the service was in any way inadequate.

I am familiar with the fact that the City of Iowa City about January 25, 1934, made an application to the Public Works Administration for a loan and grant for the purpose of building a municipal plant, and subsequently there was an application to reinstate that and later to revise it to make it call for a grant only. The company filed protests with the PWA authorities in connection with the original loan and grant application and the application to reinstate the same. In addition we protested orally to the PWA authorities or to the persons whom we were informed when we came here for that purpose would listen to our objections. That protest was made to Major Fleming and to R. V. L. Wright, who was the man we understood Major Fleming, who was the assistant director, had assigned to hear our protest. We had a letter acknowledging our protest but no other word from PWA with respect to it.

The business of the company outside of Iowa City proper is not sufficient to warrant, as a matter of cost, the continuation of service to Coralville, University Heights and the rural customers at anything like current rates if the company were not permitted to engage in the distribu-
379 tion of electricity in Iowa City proper. There are approximately 75 rural customers. We have not been able to find any other outlet for the power and electrical energy which the company's plant is capable of generating which might be available in the event that distribution in Iowa City were discontinued. In the event that we were denied the right to continue to operate in Iowa City that would reduce the value of the company's plant and distribution system to its salvage or junk value.

It was stipulated by counsel that the amendment and supplement to the Bill of Complaint of Iowa City Light and Power Company should be deemed denied without filing an answer.

Stipulated Facts

At the commencement of the trial a stipulation was entered into between the plaintiff Iowa City Light and Power Company and the defendants which was identified as plaintiff's Exhibit No. 35. In it certain ultimate facts were stipulated subject to their relevancy and materiality, certain exhibits were identified and their genuineness agreed to, and in addition it was agreed that certain witnesses if called would give certain testimony. Because of the reservation of the right to object to the relevancy and materiality separate offers were made of the various paragraphs of the stipulation. The facts thus made of record either without objection or where objection by the defendant's counsel was overruled were as follows:

The plaintiff, Iowa City Light and Power Company, is and at all times referred to in its Bill of Complaint has been qualified to do business in the State of Iowa as a for-
380 eign corporation and has, continuously since the year 1912, been engaged as a public utility in the manufacture, distribution and sale of gas and electrical energy to the inhabitants of the City of Iowa City in Johnson County, Iowa, and that it is and for some time past has been serving also the inhabitants of the incorporated towns

of Coralville and University Heights, the unincorporated village of Coralville Heights and certain rural territory in Johnson County, Iowa, adjacent to said municipalities. The population of Coralville is approximately 250; that of University Heights approximately 250; and that of Coralville Heights approximately 160.

The plants and distribution systems of the plaintiff are situated wholly within the County of Johnson, State of Iowa, and the entire business of the plaintiff as a public utility as aforesaid is conducted within said county and state and is wholly and entirely intrastate in character. Johnson County is an interior county in the State of Iowa and is approximately fifty miles from the state line between the states of Iowa and Illinois, which is the nearest other state.

It is contemplated and intended that the municipally owned electric light and power plant and distribution system for which the grant, which is the subject matter of this cause, is intended will only serve consumers in the State of Iowa and the business in which it will engage will likewise be wholly intrastate and confined to Iowa City, Johnson County, Iowa, and the immediate vicinity.

Plaintiff is the owner of real and personal property in Johnson County, Iowa, and is a taxpayer of
381 the United States, the State of Iowa, Johnson County and the City of Iowa City, and has been assessed and has paid as taxes substantial sums to said governments and governmental units.

Plaintiff is the owner of a combined steam and hydroelectric generating plant in Coralville in Johnson, County, Iowa, distant about two miles of Iowa City and of a manufactured gas plant in Iowa City and of both electricity and gas distribution systems in Iowa City and adjacent territory and is the only public utility now serving or equipped to serve either gas or electricity to the inhabitants of Iowa City.

Under contract with the City of Iowa City the engineering firm of Lucas & Luick of Chicago, Illinois, appraised and made an analysis of the operations for the year 1934 of the electric and gas properties of the plaintiff and in June, 1935, made a report to said City of such operations and of the reproduction cost new and the reproduction cost

new less depreciation of each of said properties as of January 1, 1933.

Thomas J. Lucas of said firm would qualify as an expert witness and if called would testify that such analysis and appraisal was made by him and that in his opinion the value of the plaintiff's electric plant and distribution systems above referred to as of said date and on the basis of reproduction cost less depreciation was $1,378,393.00, and the value of its gas plant and distribution system at said
382 time and on said basis was $674,237.00; that the gross revenue of the electric departments for the year 1934 was $311,158.13, its operating expenses for the electric department for the year 1934 were $212,718.52 and the operating income for said department for said year was $98,439.61 and the rate of return for said year on the valuation to which said witness would testify as above set forth was 6.77%; that in his opinion the company's electric plant and distribution system has been well maintained and efficiently and economically operated; that in his opinion if the Iowa City Light and Power Company were to be prevented from operating both the gas and electric departments as units of a combined system, the elimination of the electric department would substantially increase the operating expenses of the gas department.

Since January 13, 1934, plaintiff has continued its use of the streets of Iowa City and the service, distribution and sale of electrical energy to said City and its inhabitants without other franchise, but no notice has been given the plaintiff to cease such service or to remove its property and no action has been taken by the City Council to terminate plaintiff's service or its occupancy or use of the streets.

Plaintiff has protested to the City officials and the City Council against said municipal electric light and power plant and the City intends to proceed despite said protests and no further protests to the Council will prevent such action.

Wayne G. Cook, a member of the firm of Lane &
383 Waterman, and one of the counsel for plaintiff in these proceedings, a duly qualified and practicing attorney, formerly professor of law at the State University of Iowa, at Iowa City, and familiar with municipal records,

if called would testify that he is thoroughly familiar with the manner in which the records of the City Council of Iowa City were kept; that he has personally made an examination of all of the records of the proceedings of the City Council of Iowa City, Iowa, covering the period subsequent to October 1, 1932, and prior to April 17, 1934, and that there is no record in any such proceedings of any action by the City Council relative to the question of establishing municipally owned electric light and power plant prior to September 1, 1933.

If the City of Iowa City, Iowa, is permitted to
384 construct a municipal electric light and power plant and distribution system, it proposes forthwith upon completion of such construction to cause plaintiff to discontinue entirely the distribution of electric energy within the limits of said City and to remove from the streets, alleys and public places in said City all poles, wires and other equipment for the distribution of electric energy.

By consent of defendants and without prejudice to the right of plaintiff to have such issues determined in any appropriate proceeding, plaintiff withdrew from the issues made by the pleadings herein those issues relating to the alleged invalidity and illegality under the laws of the State of Iowa, of the establishment of a municipal electric light and power plant and distribution system in the City of Iowa City, and the issuance of revenue bonds, such issues being now subject to adjudication in an action pending in the District Court of the State of Iowa in and for Johnson County.

Exhibits Identified and Received in Evidence

By the stipulation, plaintiff's Ex. 35, exhibits marked for identification plaintiff's Ex. 36 to 57, inclusive, (including plaintiff's Ex. 49-A) were identified and their authenticity and competency, but not their relevancy, agreed to. The exhibits offered and received in evidence, either without objection or where objection of defendants was overruled, were as follows:

Plaintiff's Ex. 36—Franchise Ordinance of the City Council of Iowa City, Iowa, dated January 13, 1909, granting permission to Plaintiff's predecessor, Iowa City Electric Light Company, to furnish electric light and power to

the City of Iowa City and the inhabitants thereof, for a term of 25 years, which it was stipulated had been validly assigned to plaintiff, Iowa City Light & Power Company in 1912, and under which said plaintiff has occupied the streets of Iowa City and served electricity to the City and inhabitants from 1912 to the expiration of said franchise on January 13, 1934.

Plaintiff's Ex. 37—Ordinance of the City Council of Iowa City, dated June 18, 1934, fixing electric rates to be charged by plaintiff in the City of Iowa City. It was stipulated that those rates are the ones under which plaintiff is now operating and that said Ordinance is still in full force and effect.

Plaintiff's Ex. 38—Resolution of City Council
385 adopted February 2, 1934, requiring Iowa City Light and Power Company to report its business for 1933.

Plaintiff's Exs. 39, 40 and 41—Resolutions of the City Council, after expiration of plaintiff's franchise, directing additional service and the installation of street lights.

Plaintiff's Ex. 42—Contract of December 6, 1935, between plaintiff and the City of Iowa City, under which plaintiff agrees to furnish electric power to the City for the operation of a municipal sewage disposal plant. It was stipulated that this contract is still in effect.

Plaintiff's Ex. 43—Franchise Ordinance of the Town Council of Coralville, Iowa, dated February 14, 1934, granting plaintiff a franchise to furnish electricity to the town and its inhabitants for a period of 25 years.

Plaintiff's Ex. 44—Franchise Ordinance of the Town Council of University Heights, Iowa, dated April 11, 1936, granting plaintiff a franchise to furnish electricity to the town of University Heights and its inhabitants for a period of 15 years.

Plaintiff's Ex. 46—Resolution of the City Council of Iowa City, dated January 5, 1934, authorizing and directing the Mayor and City Clerk to file an application with the Federal Emergency Administration of Public Works for a loan and grant for the construction of a municipal light and power system and for acquiring or constructing a distribution system for electricity in Iowa City.

Plaintiff's Ex. 47—Abstract of election held April 17, 1934, to determine whether or not the City of Iowa City

should establish a municipally owned electric light and power plant and distribution system, with canvass of votes showing that project carried by a vote of 2959 to 2804—a majority of 155.

Plaintiff's Ex. 48—Minutes of Meeting of City Council of Iowa City, dated May 4, 1934, tabling an ordinance relating to the establishment of a municipally owned electric light and power plant and distribution system.

Plaintiff's Ex. 49—Resolution of City Council of Iowa City, dated October 5, 1934, to return unexecuted an agreement proffered by PWA, providing for a loan and grant in the amount of $917,000.00, for the construction of a municipally owned electric light and power plant and distribution system.

Plaintiff's Ex. 50—Ordinance of the City Council of Iowa City, dated April 5, 1935, establishing a municipally owned electric light and power plant and distribution system.

Plaintiff's Ex. 51—Resolution of City Council of Iowa City, dated April 5, 1935, resolving that the application of Iowa City for a grant and loan of $917,000.00 from PWA, for the construction of a municipally owned electric light and power plant and distribution system, be renewed and reinstated with PWA.

Plaintiff's Ex. 52—Resolution of City Council of
386 Iowa City, dated June 17, 1935, resolving that the application of Iowa City for a loan and grant of $917,000.00 from PWA, for the purpose of constructing a municipally owned electric light and power plant and distribution system, be revised so as to request a grant only of 45% of said sum.

Plaintiff's Ex. 49-A—Resolution of City Council of Iowa City, dated March 6, 1936, accepting final offer of the United States, made January 8, 1936, copy of which offer is annexed to Defendant's Answer as Exhibit "A" thereto.

Plaintiff's Ex. 53—Original Application of City of Iowa City, for PWA Loan and Grant, dated January 5, 1934, copy of which is annexed to plaintiff's bill as Exhibit "A" thereto.

Plaintiff's Ex. 57—Resolution of City Council of Iowa City, directing plaintiff to submit to the City a sales price

for its electric distribution system in Iowa City and its immediate vicinity.

Plaintiff's Ex. 56 was offered for the purpose of
387 establishing that the plant which the City proposes to erect and for which it has called for bids is a steam plant and not a hydro-electric plant, and it was thereupon agreed and stipulated by counsel that that is the type of plant which the City proposes to erect, whereupon the offer of the exhibit was withdrawn.

Proceedings in Connection with the Offer of Certain of the Exhibits Above Referred To.

Following the introduction of plaintiff's Ex. 49 which was headed "Resolution to Return Light Plant Loan and Grant Agreements" there was read into the record from said exhibit the following. Paragraph 2 of the preamble of the resolution is as follows:

"It is not contended in the City's application that better electric service would be furnished by a municipally owned plant—in fact, the present service is generally recognized to be good and adequate.

"3. Since the application for a loan and grant was made electric rates in Iowa City have been greatly reduced by the voluntary action of the privately owned company and also by ordinance unanimously passed by this Council, and we believe that lower rates for electricity in Iowa City in the long run can be had from the plant that is now established than from a municipal plant."

Said Exhibit also contained the following:

"1. The contract requires a warranty on the part of the city before any money can be obtained, that no litigation or other proceedings are now pending or threatened, while litigation is threatened and numerous legal questions involving the validity of the election and the right of the city to construct the municipal plant have been raised and will undoubtedly be litigated. The contract also contains many burdensome qualifications which under present conditions are impracticable, if not impossible, to comply with."

Immediately following the introduction of plaintiff's Ex. 53 (the application of the City for PWA loan and grant) the following occurred. Mr. Cook: The document being

too voluminous to read in full, even by way of argument, I request the privilege of reading two or three short paragraphs which I want to bring to the Court's attention. I am reading the third paragraph on page 5 of the exhibit, and quoting:

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"The service given by the Iowa City Light & Power Company has been excellent. The quality of service being due to adequate equipment, high standards of construction and competent operation. To produce the same quality of service with a municipally owned plant can be accomplished only by the adoption of similar standards. This report proposes that the city of Iowa City will operate its light and power department as efficiently as though operated by a private corporation. It is further proposed that the use of electricity will be promoted as vigorously with municipal as well as with private ownership, and that the same high standards of construction and operation will be maintained as now exist on the property of the Iowa City Light & Power Company."

Reading from page 9, the first page following a tabulation of figures:

"Overhead Distribution System

"The distribution system of the Iowa City Light & Power Company is adequate to provide service to all electric consumers of the city. The system has been maintained in good condition and very little deferred maintenance is in evidence. It is operated at 2,300 volts, two phase, 60 cycle.

"The present street-lighting system in the residential sections of the city is owned by the company and under contract with the city have been furnishing all maintenance and renewals of lamps."

Referring to the last paragraph on page 12, under the subheading "(k) Number of Men Employed" it reads as follows:

"It is estimated that this project will employ approximately the equivalent labor of 60 men for 12 months."

From page 18, near the bottom of the page under the heading "Results of Recent Rate Reductions":

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"The result of the rate reduction recently offered to the City, effective January 1, 1934, will be to fur-

ther reduce the total revenue from electric sales. The Company has presented certain figures showing that the annual reduction in revenue with the new schedule of rates will be approximately $49,000. as based on the revenue for 1932."

Proceedings in Connection With Exhibits Excluded From Evidence.

Plaintiff's offered in evidence Exhibit 45, the authenticity of which was stipulated, being a report of the Lights Committee of the City Council of Iowa City, submitted to the Council, September 1, 1933, in which it was recommended that the City of Iowa City acquire and operate its own electric distribution system. Counsel for defendants objected upon the ground that it was irrelevant to any of the issues in the case. Counsel for plaintiff thereupon represented to the Court that plaintiffs proposed to show by other evidence that this was the first step taken by the City Council of Iowa City looking to the establishment of a municipally owned electric light and power plant and distribution system; that it occurred after the passage of the National Industrial Recovery Act; that it referred to the Acts of the Public Works Administration as an inducing cause; that it showed a causal connection between the acts of defendants and the damage occurring to plaintiff; and plaintiffs offered to prove by the introduction of this exhibit the report that—

"Public ownership of utilities is favored by President Roosevelt. The Public Works Administration will lend money to cities to build their own plants. Large Federal power projects are being undertaken in the four corners of our country, and the Federal Power Commission is dominated by public ownership influences."

The foregoing was quoted from the Exhibit. The Court declined to permit the introduction in evidence of Exhibit 45, or to permit the offer of proof, to which rulings plaintiff duly noted an exception.

Plaintiffs offered in evidence Exhibits 54 and 55, the authenticity of which was stipulated, the documents being identical in character, and being Resistances filed by plaintiff with the Public Works Administration, the first having

been to the original application of the City of Iowa City to PWA for a loan and grant, and the second having been to the reinstatement of the application of Iowa City for a loan and grant. They were lengthy documents con-
390 taining a statement of the facts with respect to electric service in Iowa City and the reasons advanced by plaintiff why the applicatio of the City for funds for the construction of a municipally owned electric light and power plant and distribution system should not be granted. They reviewed the situation existing in Iowa City and the things which had occurred there in connection with the project. Counsel for plaintiff represented to the Court that they were offered not for the purpose of proving the truth of the facts therein stated, but to show an exhaustion of administrative remedies by plaintiff, and to show the information before the Public Works Administration when it acted upon the City's application, and made the offers referred to in the pleadings and the evidence; that they were relevant upon the issue of whether the Administrator had exceeded his authority under the Act by selecting projects which did not come within its terms; that without the evidence which the Administrator had before him at the time he acted, plaintiff's argument must be limited to the Findings of the Administrator; that plaintiffs wish to show that this project did not qualify under the terms of the Act; that the offered exhibits bore upon the eligibility of this project under the terms of the Act and upon the question of whether any discretion reposed in the Administrator with respect to such projects was properly exercised.

Upon objection by counsel for defendants, the Court ruled that said Exhibits were inadmissable, to which ruling counsel for plaintiffs duly noted an exception.

R. R. MacDonald, recalled as a witness on behalf
391 of plaintiffs testified as follows:

The document marked plaintiff's exhibit 58, dated June 20, 1935, addressed to The Honorable Mayor and City Council of Iowa City, and signed by Iowa City Light and Power Company, by its vice president, is a true copy of a letter or communication sent by the plaintiff company to the city council on or about that date pursuant to the request in the resolution plaintiff's exhibit 57.

The document marked plaintiff's exhibit 59, dated Iowa City, Iowa, June 27, 1935, addressed to Joseph F. Porter, Iowa City, Iowa, and signed by J. A. Swisher, George Bouck, H. F. Willenbrock, T. A. Foote, W. F. Boiler, J. Van der Zee, Earl W. Kurtz and Thomas E. Martin, is a true copy of the reply received from those gentlement on or about the date it bears and subsequent to our letter just identified as plaintiff's exhibit 58. The signers of that letter were at that time and are now the Mayor and members of the City Council of the City of Iowa City.

392 Exhibit number 60 dated July 5, 1935, addressed to the Honorable Mayor and City Council of the City of Iowa City, Iowa, is a true copy of a letter sent by the plaintiff company to the city, its mayor and council on or about that date in response to the letter plaintiff's exhibit 59.

It was thereupon stipulated that the defendants waived any objection to these exhibits upon the ground that they were copies rather than originals.

Plaintiffs offered the three foregoing exhibits in evidence, and they were objected to upon the ground that they were not relevant to any of the issues in the case. Counsel for plaintiffs represented to the Court that said exhibits would show that there were negotiations between the Iowa City Light & Power Company and the City of Iowa City with reference to an offer to sell to the City the electric plant and distribution system, and an offer to reduce the rates at least as low as that named in the application filed with the Public Works Administration. Exhibit 58 consisted of a letter from the Company to the Mayor and City Council of Iowa City, dated June 20, 1935, in which the Company offered to sell, free and clear of all incumbrances, for the sum of $1,125,000.00, or in the alternative, if the City would abandon its plan to build a municipal plant, to put into effect a specified schedule of electric rates. Exhibit 59 was a letter, signed by the Mayor and City Council, in reply to Exhibit 58, in which the City refused the offer of sale because it exceeded the total amount which the voters had authorized to be expended and did not include materials and supplies, office and shop equipment and furniture essential to a complete system, and refused the

proposal to abandon the municipal plant because they contended that the rate agreement would be unenforceable. Exhibit 60 is a letter from the company to the Mayor and City Council of Iowa City, in reply to their letter, Exhibit 59. The Company there offered the City a five year option to purchase the electric plant and distribution sys-
392-a tem for the sum of $900,000.00, to be exerciseable upon the Company's failure to abide by the rate schedule proposed in Exhibit 58.

The Court ruled that these exhibits were inadmissible upon the ground that they were immaterial, and counsel for plaintiffs duly noted an exception.

P. F. Hopkins, called as a witness on behalf of the
393 plaintiffs and being duly sworn testified as follows:

I am State Director for PWA for the State of Iowa. I was originally State Engineer. The State Office of PWA for Iowa was opened on August 15, 1933. I have been in charge of that office continuously since it was opened. As originally set up the State Office consisted of a State Advisory Board of three members appointed by the President and a State Engineer appointed by the Administrator of PWA who would be the Executive Officer of the Advisory Board and would be in complete charge of administrative details of the office. Applications would be filed with the State Engineer and submitted to the Advisory Board at their convenience. There was no difference in any of the applications, except that certain priorities were set up by the Public Works Administration as to the desirability of the projects. Examination of the projects were usually made in advance of the submission of the application to the Advisory Board. Action of the State Advisory Board was always obtained before the application and recommendation were sent to Washington.

I recall the application of the City of Iowa City filed about January 9, 1934. I investigated it. I made no separate investigation of the facts but based by recommendation upon the information contained in the application and my own knowledge of those matters. The application was referred to the State Advisory Board but it did not make any report in connection with the project. I made a report on this project which was forwarded to the Administrator in Washington.

The witness was thereupon asked if his report was on a form and if it consisted of one document or more than one.

The question was objected to as irrelevant and the
394 Court sustained the objection. Counsel for plaintiff noted an exception and represented to the Court that he was attempting to ascertain just what form the report took in order that he might know what to demand as a result of a subpoena which had been issued. He further represented that in exchange for the agreement of Government counsel to produce the witness and his files, the plaintiff had waived its right to take his deposition. That he had not been permitted to examine the witnesses files; that he must make his record with respect to those files by this witness and that that was the purpose of his present examination. Plaintiff duly noted an exception to the Court's ruling.

The original application of Iowa City was approved but the City returned the loan and grant agreement forwarded to it by PWA. This was the equivalent of withdrawing its application. Later another City Council asked for the reinstatement of the application. This was by way of resolution and no new application was filed. No additional information relative to the nature of the project or the facts upon which it was based was submitted. Neither was such information submitted when the application was modified by a resolution of the City Council to apply for a grant only. Specifications have been filed for certain equipment and bids taken on those items. We do not require detailed plans and specifications to be filed with the original application. We require only such information as may be necessary for us to make a reasonable check of the request.

At the time this application was examined we had only
395 the Engineering Division. About a year ago a legal and a financial section were set up in the State Office. I think the finance and legal sections existed at the time of the request to reinstate the application.

Thereupon the following occurred:

Q. Was the application referred to those divisions in your office at any time? A. No, because all we received was a copy of the resolution asking reinstatement, which was forwarded to the central office in Washington for consid-

eration. Inasmuch as the application had passed through the central office completely once before, there was no reason to re-examine it in the State Office.

By Mr. Cook.

Q. Was any investigation made of the facts in connection with the Iowa City project by your field office there, other than the one which you have testified to, that you made based upon the application of the city when the application was originally filed?

Mr. Holtzoff. If your Honor please, I do not think it is relevant or material as to what investigations were made.

The Court. He has testified that there was an original application and then it was afterwards withdrawn. Now, that application was afterwards reinstated, and the purport of the question, as I understood it, is: Was any further investigation made when the application for reinstatement was made? I do not think it is important at all, but if the witness can answer it "yes" or "no" I do not care.

Mr. Holtzoff. I will withdraw the objection.

The witness. The answer is no.

By the Court.

Q. There was not anything further done? A. No, sir.

The Court. He said that in substance. Inasmuch as it had been gone over before, all he did was to forward it to Washington.

The Witness. There were no changes in conditions which would justify us making any further study of it.

It was thereupon stipulated by counsel that Mr.
396 Acheson's request for the production of the report of the Engineering, Legal and Financial Divisions with respect to this case, and the record made in connection therewith, should be applicable to this case.

Plaintiff thereupon requested the production of an intradepartmental communication on NEC Form 3 headed "Application for Allotment of Funds Under Emergency Relief Appropriation Act of 1935, Non-Federal Project" addressed to the National Emergency Counsel, Washington, D. C., and signed by or for the Federal Emergency Administrator of Public Works, probably by an Assistant,

and referring to the grant of $413,000.00. Counsel for defendant declined to produce the documents upon the grounds theretofore advanced as to the inadmissibility of intradepartmental communications, and on the ground of their irrelevancy. The Court sustained their position to which plaintiff noted an exception. Plaintiff's counsel thereupon represented to the Court that his reason in demanding the production of the documents was that it would show that the percentage of total cost that labor bore in this project was less than 25%, to be exact 19.7%; and further in the reasons given under the heading "Justification", the report stated:

"The proposed municipal system will be able to
397 reduce the rates to all classes of customers and return substantial profits to the municipality. It will also provide permanent employment for a number of men."

The witness was thereupon asked whether in view of the situation existing in Iowa City, the establishment of the municipal plant would not throw out of permanent employment substantially the same number of people as would be employed if the new plant were constructed. This question was objected to as irrelevant. The Court sustained the objection to which the plaintiff noted an exception.

Counsel for plaintiff thereupon requested counsel for defendant to produce the report and recommendation made by the witness P. F. Hopkins as State Engineer in connection with the Iowa City project. Counsel for defendant declined on grounds heretofore stated and the Court sustained their position. Plaintiff noted an exception to the ruling.

Counsel for plaintiff thereupon requested the production of the report made by R. V. L. Wright on the remonstrance of the plaintiff in conection with the application to reinstate the original application for loan and grant. Counsel for defendant declined upon the same grounds, the Court sustained them in their position, to which plaintiff duly noted an exception.

Plaintiff thereupon asked for the production of any other memoranda or reports by the Field Office of Iowa and the
Witness Hopkins made to the Administrator or the
398 Department in connection with the Iowa City proj-

ect and before its final approval and the allotment of funds. This request was declined upon the same grounds. The Court sustained the defendant's position and the plaintiff duly noted an exception.

On *cross examination* the witness testified as follows:

Allotment of funds have been made for something over 300 PWA projects in the State of Iowa. Of these five were for municipal electric light projects.

Whereupon **Dan H. Wheeler** was called as a wit-
399 ness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct examination.

At the present time I am Associate Director of the Projects Division. I have been with the Public Works Administration since the 15th of July, 1933. The Projects Division is one of the divisions of the Public Works Administration. They are a coordinating division.

I am more or less familiar with the procedure through which a non-Federal application goes from its original making to the final approval. A non-Federal application broadly means an application by a State or political subdivision of a state for a loan or a loan and grant—applications from some parties other than agents of the Federal Government.

In 1933 and 1934 Colonel Waite was Deputy Administrator. The Deputy Administrator was the assistant to the Administrator. Mr. Fleming was at first Executive Officer, and later Deputy Administrator. He succeeded Colonel Waite as Deputy Administrator. The Executive Officer, generally speaking, was the administrative officer of the Administration. He handles matters of personnel and so forth. The organization of PWA which dealt with non-Federal projects was first the field organization. That consisted of a Public Works official designated as a State Engineer and staff and a—I cannot think of the exact name of the board—a regional board, the State Advisory Board. In Washington we have Examining divisions, the Legal Division, the Finance Division and Engineering Division. Above them the Projects Divi- is a coordinating agency only. The applications were received in Washington by

the Projects Division and preliminary review was made to determine if they were complete, and then a copy of each application was sent to each of the Examining divisions.

There was a technical Board of Review to which
400 some special cases were referred; not all cases. I do not know whether the Electric Board of Review took the place of the Technical Board of Review, so far as electric projects were concerned. I do not know what the functions of that board were. I am more or less familiar with the tests for eligibility of projects set forth on page 7 of Circular No. 1, Plaintiffs' Exhibit 119. When an application was filed and sent on to Washington, all of the information of a technical nature was examined by the Engineering Division. I think they considered the economic desirability in some instances. By "economic desirability" I mean the need for the project. The unemployment in the locality which applies for the loan is stated in the application, I think. I do not know whether there is any check made on that. I do not know of my own knowledge whether the Engineering Division makes any examination as to the earnings or expenses in the financial operation of the plant, or where that investigation is made. When the Engineering Division finishes its examination of the technical aspects of the problem and its economic desirability and the need for it, and anything else which it examines, it writes a report and recommendation. In the report it states the facts as it believes them to be. It sends the original of it to the Projects Division and distributes copies to the various other units of the administration.

The Finance Division, when an application comes to it, examines the application from the financial aspects, and likewise submits a report and recommendation. I do not know of my own knowledge what investigation the Finance Division makes when the project is one which is expected to be self-liquidating. The Finance Division report or finding with its conclusion goes to the Projects Division. The Legal Division does what its name implies—looks into the legal aspects of the matter, and also sends a report
401 on to the Projects Division. The Projects Division gathers all these reports and recommendations into one folder and they have a summary sheet which states the

essentials of the application, which is then signed by a representative of each of the examining divisions. Then it gathers into a file those which have been approved by the examining divisions. It keeps a list of the approved projects for the purpose of allotment of funds. It sets aside these projects that have been disapproved for such further action as may be necessary, reconsideration by the Examining Division which has made an adverse recommendation, for reference to the Technical Board of Review and such other examinations as may be made. It makes a list of those projects on which approving recommendations have been made by the various examining divisions and presents that list, through the director of the division, to the Deputy Administrator and the Administrator. It sends simply a list of projects with the statement that they have been approved. I do not know what the Administrator does with that list. These projects were presented to the Special Board for Public Works by the Administrator under the original appropriation. Each project on which the Special Board or the Administrator recommended allotment was presented to the President for his approval. The Administrator has a list showing various projects with the statement that they have been approved by the examining divisions, and he brings that before the Special Board for Public Works. The Special Board adopts a resolution recommending allotment to this project. The action which the Administrator takes is to sign the book in which the resolutions adopted by the Special Board for Public works are included. The book with a list of the projects in it goes to the President.

By the Court:

Q. Have you ever seen the book? I assume the President signs something in the book. Have you ever seen that book? A. Yes, sir.

402 Q. With the President's name in it? A. With his initials in it; yes, sir.

Q. Is there anything besides the initials? A. "O. K."

The Court. I suppose we would be justified in assuming that that means that he approves it. I do not want to ask questions that are objectionable to anybody, but I would

like to know this, and it seems to me it ought to be proved in some way.

By the Court:

Q. The President puts his initials in the book with the letters "O. K." Is that at the end, or where? A. On the last sheet of the book. I cannot say that that is the case in all cases, but those books that I have seen have his "O. K." and his initials on the last sheet of the book.

Q. Indicating approval of all the projects in the book? A. It may be one project or it may be many.

Q. But the President's "O. K.", with his initials, is approval of all the projects in that book? A. If he approves them all; yes, sir.

When a disapproving recommendation is received from one of the Examining Divisions, unless additional information is elicited which would permit the Examining Division to reverse its recommendation, the report and recommendation of that division come to the Projects Division, and when the other reports are submitted the facts of the case are written up on a cap sheet and it is presented to the Assistant Administrator and the Administrator for disapproval. For their action, I should have said.

Under the Emergency Relief Act of 1935, the Special Board for Public Works does not pass on cases. The lists are made up in much the same way as they were before and
are presented to the Assistant Administrator and the
403 Administrator for action, and those to which they recommend allotments are again put into the President's book and transmitted to the President for his action. Information relative to them was at one time transmitted to the National Emergency Council.

Cross Examination

The findings made by these various divisions were merely recommendations. And the same is true of the Special Board for Public Works, a I understand it. I do do not know what the Administrator or the President considered in each particular case in reaching a conclusion, or with whom they consulted. So far as I know they may have

consulted all the documents in the files or had numerous discussions and oral or written recommendations. Under either statute, after there has been approval, the so-called allotment is a prelude to the making of a contract with the applicant. The contract is made on behalf of the United States, through the Administrator or someone designated by him. Before any moneys are paid out, of any kind, a contract is executed between the applicant and the United States in the manner I have indicated. I do not know of my own knowledge the scope of the duties of the Deputy Administrator and the Assistant Administrator.

Upon recross examination the following questions and answers were made:

Recross Examination

By Mr. Frank:

Q. Do you know of your own knowledge the data upon which the President relies in making his approvals? A. No, sir.

Q. So far as you know, he may have had numerous conversations with numerous persons? A. So far as I know.

Q. He may have had before him various kinds of data, and you do not know of your own knowledge? A. No.

404 Q. You are not, then, testifying as to what the President relied upon in giving that approval? A. No, sir. I do not know.

Mr. Frank. That is all.

Upon further recross examination the witness stated that so far as he knew the Bureau of Investigations under Mr. Glavis might investigate these matters; that the Administrator had not confided to the witness all his sources of information.

Whereupon **Benjamin W. Thoron** was called as a

405 witness on behalf of the plaintiffs and, being first duly sworn, testified as follows:

Direct Examination.

I am finance Director of the Public Works Administration. I have held that position since approximately the first of December, 1935, prior to which I was Assistant Finance Director for about a year. Prior to that I was a

Finance Examiner from August, 1933. The Finance Division obtains the facts upon which it makes its recommendations or conclusions regarding the self-liquidating character of a proposed project primarily from the data submitted in the application, which is sworn to by authorized officials of the applicant under, I believe, a penalty clause. That information is checked against any available published source; and in cases where there appear to be discrepancies or gaps, additional information is sought ordinarily by correspondence.

The reports of Engineering Division indicate that it investigates the expected future earnings and expenses of a proposed electric plant. Their reports are submitted to us for our information and are considered in connection with the data submitted in the application. That is not peculiar to electric power plant applications. The same is the case in all applications for loans for projects which are considered to be revenue producing. I think that is necessary in any new system, any new business, to rely upon estimates of future earnings and future expenses. It is all one can rely on. I think it is not strange or unusual to predict earnings for a period in the future. I think very few of our corporations would have been financed without that.

The Finance Division does not make any inquiry to determine whether or not an applicant can go forward with its project by getting money from private sources before it makes a recommendation. I think I should qualify that a little bit. One element that is considered in pass-
406 ing upon the credit and the probability of repayment of a loan is the market appraisal of the outstanding securities of a municipality. But that is only one element in considering the whole problem. The Finance Division would recommend a loan where it was perfectly apparent that the applicant could get the money from private sources. The recommendation of approval by the Finance Division has nothing to do with whether the applicant will actually, if it goes ahead to construct the project, avail itself of the allotment for the loan. It may, subsequent to allotment, sell its securities on more favorable terms to others; but the probability of its being able to subsequently

sell its securities on more favorable terms—would not be considered. It is not the function of the Finance Division to determine whether or not the Public Works money shall be loaned to someone instead of borrowing from private sources. So far as I know, no other division or agency make inquiries as to whether the applicant can borrow from other sources.

Cross Examination.

The function of the Finance Division is purely advisory. We have no power to take action. What the other divisions do or do not do I would only know from hearsay. What the Administrator relies upon in giving an approval or in subsequently executing a contract I would not know, nor would I know what the President relied on.

I have had before me applications for loans secured by general revenue bonds of cities payable solely out of taxes, and I have also had applications which involved solely revenue bonds payable solely from the revenues of the system to be constructed or improved with the proceeds of the loan and grant, and with no right on the part of the holder of the bonds to in any way call upon the city to exercise its taxing power to pay principal earnings. It is quite possible that a city's revenue bonds might be good se-
407 curity although the city's general obligation bonds might not.

Redirect Examination.

In passing upon the self-liquidating character of the loan where there is to be competition or there may be competition between a municipal project and a private project, the Finance Division considers the question of competition as it will affect the revenues. Whereupon the following occurred:

Mr. Acheson—

If it is possible or considered wise that the competition should be eliminated, it makes that recommendation? Counsel for the defendants objected.

The Court. I do not think it is admissible on any theory. What relevancy has it to any issue involved here?

Mr. Acheson. I except to your Honor's ruling.

Whereupon **T. O. Kennedy** was called as a witness
408 on behalf of the Plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination.

I am general manager of the Ohio Public Service Company, Cleveland, Ohio. My company did sell power wholesale to the municipal distribution system operated by the village of Hiram, Ohio in November, 1934. The village of Hiram made an application to the Federal Emergency Administration of Public Works for a loan and grant to build a generating system of their own some time prior to November, 1934. On November 5, 1934, I wrote a letter to the Honorable Harold L. Ickes, Administrator, Public Works Administration, Washington, D. C., in relation to the matter of the application of the village of Hiram for this loan and grant. I received a reply to my letter of November 5 addressed to the Administrator. I identify a letter dated November 26, 1934, addressed to me as the reply which I received.

Whereupon Letter Nov. 26, 1934, Hunt to Kennedy, heretofore marked Plaintiffs' Exhibit No. 125 for identification, was received in evidence.

Plaintiffs Exhibit 125.

Your letter of November 5 addressed to the Administrator, regarding the Hiram, Ohio, electric project, No. 3412, has been referred to me for reply.

You request that the matter be reopened and that the engineering department of the Public Works Administration determine what in its opinion would be the cost to the Village of generating its own power, and you state that you have no doubt that you could accept that opinion as a basis upon which to fix the rate for power to be purchased from your company.

If a utility company wishes to offer reduced rates
409 to a municipality which has applied for a loan to finance a municipal electric project, the Administrator will consider its effect on the social desirability of the project, but it is not the practice of the Administrator to suggest to a company the exact rates which it would have

to put into effect in order to eliminate the desirability of the project.

Allotment has already been made for the Hiram project and a loan and grant agreement has been executed. The necessary steps preliminary to the purchase of the bonds offered by the City are now being taken. However, if, prior to the purchase of the bonds, your Company offers a new rate to the Village of Hiram and sends a copy of the offer to this Board, we will give the matter consideration.

Very truly yours,

HENRY T. HUNT, *Chairman,*
For the Administrator.

The witness resumed his testimony as follows:

My company operates in the City of Sandusky, Ohio. It had an electric distributing and generating system there in August, 1934. Prior to August 14, 1934, the city of Sandusky, Ohio, applied for a loan and grant of funds from the Federal Emergency Administration of Public Works to build a municipal electric light plant. On August 14, 1934, I wrote a letter to the Honorable Harold L. Ickes, Administrator, Public Works Administration, Washington, D. C., relative to the application of the city of Sandusky. I received a reply, and this is it. (Whereupon Letter Aug. 27, 1934, Hunt to Kennedy, was marked Plaintiffs' Exhibit No. 127 for identification.) Subsequent to August, 1934, I received two other letters from the Federal Emergency Administration of Public Works on the same subject matter, one dated September 18, 1934, and the other
410 dated October 2, 1934. These are the letters.

(Whereupon letter Sept. 18, 1934, Hunt to Kennedy, was marked Plaintiffs' Exhibit No. 128 for identification, and Letter Oct. 2, 1934, Hunt to Kennedy, was marked Plaintiffs' Exhibit No. 129 for identification.)

After the receipt of these two letters which have been marked for identification Plaintiffs' Exhibits Nos. 128 and 129, I was given by the City Manager of Sandusky, Ohio, a copy of a letter from the Federal Emergency Administration of Public Works to the City Manager dated December 5, 1934, relating to the same subject matter. This is a copy

of the letter. Whereupon copy of letter, Dec. 5, 1934, Hunt to Robt. L. J. Wager, City Manager, Sandusky, was marked Plaintiffs' Exhibit No. 130 for identification.

Mr. Acheson. Your Honor, I offer in evidence Plaintiffs' Exhibits for identification Nos. 127, 128, 129 and 130.

Mr. Holtzoff. I object to the various letters from Mr. Hunt on the ground that they relate to a subject not in litigation, and also on the ground of lack of showing of authority.

The Court. What I asked you was with respect to the letter introduced in evidence just before these.

Mr. Holtzoff. That went in subject to a motion to strike. That has been admitted.

The Court. This is in the same category, is it not? I do not think there is anything in the point about Hunt's authority. The original was directed to the Administrator and the reply recites that. I do not think there is anything in that.

Mr. Holtzoff. But this correspondence relates to a different project, and therefore I submit it is beyond the scope of the issues of this litigation. These letters from Mr. Hunt relate to the Sandusky project.

The Court. How does it differ from the one that was admitted just a minute ago?

Mr. Holtzoff. We did not object to that. It was
411 a letter addressed to the Administrator, and, of course, we did not know what it was going to evoke. I do not think that thereby we waived any rights as to these replies. The other was just an inquiry addressed by the company to Mr. Ickes.

The Court. My disposition is to sustain the objection. I do not quite see how it is different from the other one, however.

Mr. Acheson. It is not in any respect different from the other one. As I say, your Honor, if I may be permitted—

The Court. I am not going to receive evidence on every project in the United States.

Whereupon counsel argued the point.

The Court. I am going to sustain the objection, not on the ground that the papers are copies, but because they are immaterial.

Mr. Acheson. I should like to note an exception to your Honor's ruling.

The Court. Certainly.

The documents excluded from evidence were as follows:

Plaintiffs' Exhibit 127—For Identification

Washington, D. C.
August 27, 1934.

Mr. T. O. Kennedy,
Vice President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio

Dear Sir:

In reply to your letter of August 14 regarding the Sandusky, Ohio electric power project, Docket No. 7004:

You state that the offer by the Ohio Public Service Company to the City of Sandusky of a rate contract embodying exactly the rates proposed by the City for its municipal plant, is still open. It is noted also that in May,
412 1933, the Company submitted for approval by the City Commission a minimum rate of 5¢ a day including 10 kwh per month, with a rate of 3¢ per kwh for the next 290 kwh and of 2¢ per kwh for anything in excess of 300 kwh per month.

After careful study of the project, the Electric Power Board of Review inclines to the opinion that if the offer of rates identical with the proposed municipal rates is supplemented by an optional rate based upon the May, 1933, offer, said optional rate to be available to all consumers using more than 40 kwh per month, the project will be without social value and the application should be denied.

Would you be good enough to let me know whether the Company is prepared to make such an offer to the City, and to send me copies of any communications with the City relevant thereto.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

Plaintiffs' Exhibit 128—For Identification

Washington, D. C.
September 18, 1934

Mr. T. O. Kennedy,
Vice President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio.

Dear Mr. Kennedy:

In reply to your letter of September 4 with regard to the Sandusky, Ohio, electric power project, Docket No. 7004:

I attach a copy of letter I have written the City Manager on this subject. I should be glad to be informed of the progress of events from your standpoint.

One of the difficulties in this and like situations is to convince the municipality that the reduction of rates is not merely a temporary expedient whereby the opportunity to finance the municipal project through this Administration may be lost and with the intention on the part of the competing utility to raise its rates when that opportunity no longer exists. In this connection a brief from your counsel showing what action by the Public Service Commission of Ohio is necessary to enable your Company to increase its rates would be helpful. I think that such a brief should also be submitted to the city authorities of Sandusky. My own view is that your offer is an admission that the rates proposed would earn a fair return on your property used and useful in connection with the service to Sandusky consumers and that the acceptance of such rates will not only constitute a contract with the city but would amount to an estoppel in the absence of later changes in economic conditions which would justify the Commission in holding that the rates prescribed by the contract would no longer be sufficiently remunerative to enable the Company to render service to Sandusky and its other consumers. It would be highly desirable from our standpoint that the city authorities be convinced that the

413

acceptance of your offer and the withdrawal of their application here are in the interest of the city.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

(Enclosure in Exhibit 128)

September 17, 1934

Mr. Robert L. J. Wagar,
City Manager,
Sandusky, Ohio

Dear Mr. Wagar:

In reply to your letter of August 30 addressed to the Administrator with regard to Docket No. 7004, electric power project for Sandusky:

On July 30, 1934, the Ohio Public Service Company submitted to you and the members of the City Commission a schedule of domestic rates as follows:

414	10 kwh per month	$1.00
	Next 40 kwh per month	.05 per kwh
	Next 150 kwh per month	.03 per kwh
	Excess over 200 kwh per mo.	.02 per kwh

The rates proposed are the same as those proposed to be charged by the municipal plant except that the 2¢ step which while only effective for full service (electric range and hot water heating) for large dwellings is a lower rate than that effective from the proposed municipal plant.

There being no social benefit apparent which would warrant the duplication of the electric service facilities in Sandusky with rates from both systems the same, and as it is doubtful that a sufficient reduction could be made in the domestic rates by the proposed municipal plant and yet provide revenues sufficient to service expenses, interest and amortization, it is the opinion of this Board that the City should accept the Company's proposal and withdraw the application for a loan and grant. I assume that such an acceptance would constitute a contract between the City and the Company under which the said rates would be the

maximum to be charged for the said service unless and until the Public Service Commission of Ohio should set aside said rates as unreasonably low. Inasmuch as the Company itself proposed these rates I think it most improbable that the Commission would take such action in the absence of substantial change in economic conditions.

While the City offers general obligation bonds and such bonds are deemed reasonable security, it is nevertheless the duty of this Administration to consider relative social desirability. As the funds of PWA are insufficient to meet municipal demands it is necessary that projects having higher social desirability be preferred. Where competitive conditions exist and the competitor offers rates as advantageous to the consumers as the proposed municipal rates, social desirability is lacking.

In addition to the foregoing considerations it also
415 appears that the proposed plant is not designed to supply the entire demand. In general a loss of part of a load requires higher charges to the remainder. Hence it appears that if the municipal plant is financed such financing will have a tendency to defer reduction of rates to other consumers served by the Ohio Public Service Company. This consideration might be outweighed by benefits to the consumers served, but those benefits do not appear here.

For the reasons stated it is recommended that the City of Sandusky accept the proposal of the Ohio Public Service Company referred to and notify the Public Works Administration that it wishes to withdraw its application for a loan and grant.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

Plaintiffs' Exhibit 129—For Identification

Washington, D. C.
October 2, 1934.

Mr. T. O. Kennedy,
General Manager,
The Ohio Public Service Co.,
Hanna Building,
Cleveland, Ohio.

Dear Sir:

This will acknowledge your letter of September 28 enclosing brief from your attorney supporting the authority of a municipality to enter into a contract specifying maximum rates for electric service for a period not to exceed ten years. We will give the brief our careful attention.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

416 *Plaintiffs' Exhibit 130.—For Identification*

Washington, D. C.
December 5, 1934

Mr. Robert L. J. Wager,
City Manager
Sandusky, Ohio.

Dear Mr. Wager:

The Electric Power Board of Review has examined the supplement dated October 29, 1934, to the application of Sandusky for a loan and grant to finance construction of a municipal electric system, Docket No. 7004, and is inclined to give favorable consideration to the application on the basis of a generating plant and distribution system to cover the entire city and to serve all the existing consumers with the exception of the larger industrial and commercial consumers. It is believed that the disparity between the rates offered by the existing utility and the rates now proposed by the applicant will make the project socially desirable.

The cost of material and labor has increased since the

original application was filed. Before proceeding with its recommendation this Board would like to have a detailed estimate of construction costs based on present prices and wages for the project as above described. The amount of the loan requested should be changed in accordance with the change in estimated construction costs. It is believed that the total cost will not exceed $1,550,000.

A supplement to the application containing the changes suggested, should be received by this Board not later than January 15, 1935.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

417 There was no cross examination.

Whereupon the following colloquy took place:

Mr. Acheson. Your Honor, I have another witness who will produce exactly the same sort of testimony. I am somewhat at a loss to know whether—I do not want to weary your Honor. Your Honor has listened to a great deal of argument, and I am rather appalled by the breadth of the ruling which your Honor has just made, which seems to me to go almost to the heart of this case. It seems to me that the matter has been left in a situation which is not the correct situation at all. If your Honor would not be wearied by a further statement of it, I should like to make it. Otherwise I will just put this witness on and offer his testimony.

The Court. I think that would be the best way for you to do.

Whereupon **D. E. Byerley** was called as a witness on behalf of the Plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination.

I am D. E. Byerley, general manager, Citizens Light and Power Company at Adrian, Michigan. That company in August, 1934, operated in Tecumseh, Michigan. The city of Tecumseh, prior to August, 1934, applied for a loan and grant for a municipal power system. On August 13, 1934, I wrote to Colonel Waite, Deputy Administrator of

Public Works, with reference to the Tecumseh, Michigan application, and received a reply addressed to Colonel Waite. This is the reply. Whereupon there was offered in evidence for the plaintiffs a letter identified by the witness dated August 22, 1934, addressed to Mr. D. E. Byerley, and signed

HENRY T. HUNT,
For the Administrator.

Mr. Holtzoff. If your Honor please, we object to this letter on the same ground, that it relates to a project not here in litigation, in Tecumseh, Michigan. There
418 appears to be no connection between that project and any of the projects here in suit.

Mr. Acheson. The letter is offered, your Honor, on account of the fourth paragraph, which states, on behalf of the Administrator, what is called the process in the Public Works Administration. If your Honor wishes me to read it, I shall be glad to—or I shall show you the letter.

Mr. Holtzoff. As to that last paragraph, we make the further objection that there is no showing that the writer of the letter had authority to make statements on behalf of the Administrator and to bind him by his statements.

The Court. I will sustain the objection.

Whereupon the Letter, August 22, 1934, Hunt to Byerley, was marked Plaintiff's Exhibit No. 131 for identification.

Plaintiffs' Exhibit 131—For Identification

Washington, D. C.
August 22, 1934

Mr. D. E. Byerley,
Vice President and General Manager,
Lenawee County Light and Power Co.,
Adrian, Michigan

Dear Sir:

Your letter of August 13 to Colonel Waite with reference to the Tecumseh, Michigan, electric power project, Docket #7307, has been referred to me for reply.

This project is now before this Board for recommendation.

I note the opinion of counsel to the effect that your Company has a perpetual franchise in Tecumseh. There is, however, no claim that it has an exclusive franchise.

The process in PWA is to examine into the question of engineering soundness, reasonable security and social desirability. The last factor depends upon whether or not the municipal project will provide current at rates substantially less than those at which it is provided by the existing utility. Hence this Board in all such cases
419 is aided by information as to existing rates and what prospect there is of rate reduction. In fact it has been its policy to afford the existing utility an opportunity to offer to place in effect such rate reduction as will meet the proposed rates of the municipality. If you wish to make any statement on this subject the Board would be glad to receive and consider it. The matter of a hearing can wait until we receive the information suggested.

Very truly yours,

HENRY T. HUNT, *Chairman*
For the Administrator.

Mr. Acheson. Your Honor, may we have it clear on the record which ground of objection your Honor sustains?

The Court. I sustain it on the ground that it is immaterial to the issues here.

Mr. Acheson. I should like the record to show that I note an exception to the ruling of the Court.

Whereupon the witness resumed his testimony as follows:

After receiving the letter dated August 22, 1934, marked Plaintiffs' Exhibit 131 for identification, I went to Washington for a conference with Mr. Hunt.

By Mr. Acheson.

At that conference did Mr. Hunt suggest any action on your part which, if taken, would result in the Public Works Administration finding that the application of the village of Tecumseh had no further social desirability?

Mr. Holtzoff. If your Honor please, I object to this on the same ground.

The Court. Objection sustained.

Mr. Acheson. I note an exception, your Honor. I offer to prove that if the witness were permitted to answer the question he would testify that Mr. Hunt stated that the Public Works Administration had figured that the village could sell power for a certain percentage less than
420 the price stated in its application, and that if the company would put into effect a rate equal to or less than that rate, the project would lose social desirability.

The Court. What you want to do is to show the nature of the proof which has been excluded.

Mr. Acheson. That is right.

The Court. So that on appeal it will be noted.

Mr. Acheson. That is all.

The Court. I have no objection.

Mr. Acheson. The record may then show that my offer was rejected and an exception taken.

421 Whereupon the following occurred:

Offer of Proof

Mr. Acheson. By witnesses Edwin Vennard and Miles Cary, now in the courtroom and ready to be called, by witness V. L. Board, who is available but who it is agreed not be called for purposes of this offer, by further testimony from T. O. Kennedy who was previously on the stand but who it is agreed need not now be recalled for purposes of this offer, by the depositions of Clarence E. Moyer and E. F. Bulmahn and by twenty-five or thirty letters signed by Henry T. Hunt, Chairman of the Electric Power Board of Review, and beneath the signature bearing the notation "For the Administrator", copies of some of which letters have been subpoenaed from the defendants, the plaintiffs offer to prove that:

—and I should interpolate at this point that I have been requested by the defendants to state, and do state, that in that offer of proof which follows, we do not mean that all of the witnesses would testify to all of the statements, but that the offer represents the composite proof.

The Court. That is proper.

Mr. Acheson. And this is the offer:

From press release No. 709 of the Public Works Admin-

istration and quotation thereof in the press various privately owned electricity utility companies, by their officers and representatives, understood that the Electric Power Board of Review had been designated by the Administrator to review applications made by municipalities to the Public Works Administration for loans and grants for electricity projects, and to entertain protests relative thereto. As a result of this information and also as a result of PWA press release 989, such companies, through their representatives, called upon or corresponded with the PWA office in Washington to protest and present facts relative to electricity projects proposed for various municipali-
422 ties in which such companies were then conducting an electricity business. Their letters, whether addressed to the Administrator or to other officials, were replied to by Henry T. Hunt, Chairman of the Electric Power Board of Review, signing "For the Administrator"; and upon personal calls at the PWA offices the companies' representatives were referred to the Electric Power Board of Review of which Mr. Henry T. Hunt, PWA General Counsel, was Chairman, and Mr. Otto M. Rau was the rate expert. So far as these representatives learned the Electric Power Board of Review during its existence was the final agency to which representatives of such companies could protest or present information before the projects were placed before the Administrator for approval.

In conferences with the Chairman of the Power Board of Review and Mr. Rau, the rate expert, privately owned utility companies were repeatedly informed that electricity rates were generally too high and should be lowered and that the rate level of the existing utility was the important thing to be considered by PWA. Companies were informed at such conferences that it was useless to present facts relating to or to discuss the small amount of employment given in the construction of such municipal projects since the Board knew that, relatively, very little direct employment was given, particularly to workmen in the vicinity the bulk of whom was unskilled, that it was useless to present facts as to the number of the companies' employees who would be thrown out of work by curtailment of the companies' operations due to competition, that the likelihood

of the companies' financial failure if projects were authorized was immaterial, that it was beside the point if rates would have to be increased or business abandoned in towns near such municipalities if proposed projects therein were authorized—that these and similar considerations were of no consequence because it was the policy of PWA to finance electricity projects and only question for the Board
423 at such conferences was the question of the Companies' rates.

Even without previous inquiry on the subject letters and telegrams signed by Mr. Hunt "For the Administrator" as aforesaid asked various companies whether they would reduce their rates in municipalities where electricity projects were proposed, and even after approval of allotments by PWA for such projects Mr. Hunt and Mr. Rau would confer with companies regarding their rates for electricity in municipalities applying for such projects. In such letters and in such conferences the companies were told many times that the policy of the Adminstrator as approved by the President was that pending applications approved by the examining divisions would be approved and the projects financed unless the companies reduced their rates to a point equal to or lower than the rates which the municipalities would charge; that if a company did so reduce its rates the municipality would be given an opportunity to reduce its rates still further, if it could do so and repay the amount borrowed to build the plant; but if the municipality would not or could not do so the project would lack the social desirability requisite to approval by PWA.

Pursuant to these advices many companies did submit to the Board, sometimes by letter to the Chairman and sometimes personally to the Chairman or to Mr. Rau, reductions in rates in municipalities where such electricity projects were proposed. In several cases, as was explained by the companies, such proposals as a practical matter had to and did embrace surrounding towns. In some instances Mr. Hunt, or Mr. Rau to whom such proposed rate reductions were usually referred for study, informed the companies that in order to render particular applications for power projects lacking in social desirability the rate proposals so submitted would have to be adjusted further,

either by way of additional reductions or of instituting optional rates to certain classes of consumers. In
424 general, the rate level which Mr. Hunt and Mr. Rau indicated that the Board was seeking was that at which the municipality in question could sell electricity and receive only enough revenue to repay the amount lent for the project.

When companies were informed by the Chairman that their rate proposals were satisfactory to the Board, it was in many cases insisted by him that, before the Board would take up the matter with the municipalities or take any further action, the proposals should actually be placed in effect, with some steps taken to estop or otherwise to prevent the companies from making subsequent rate increases.

Where rate reductions were made in this manner, or were offered to municipalities, in some cases the municipalities reduced their rates still further and the projects were approved by PWA; in other cases loans and grants were not made.

The statements made and the action taken as heretofore described occurred in cases where a company was doing business in a municipality under a franchise having a long term to run, in cases where the franchise had expired or would expire within a year or two, and in cases where a company was merely serving a municipally owned distributing system under a wholesale contract that was about to or already had expired. In all such cases, in statements both to the companies and to the municipalities, where rate reductions were contemplated or proposed by the companies, Mr. Hunt signing as Chairman of the Board and "For the Administrator" said that even though the loan were reasonably secured, the question of social desirability depended upon whether rates would be lowered.

This offer covers conferences, correspondence, or negotiations as to rates with respect to some 40 or 50 electricity generating or distributing projects proposed for municipalities, none of which were involved in this suit, scattered
425 widely over the middle western and southern parts of the country. The conferences, correspondence, and negotiations referred to took place over a period of nearly a year, from the early summer of 1934 until March, 1935.

Mr. Holtzoff. If your Honor please, we object to the testimony offered, on the ground that it is irrelevant to any of the issues in this case, and on the ground that it is incompetent.

Now, all of the testimony is cumulative of testimony that your Honor has already ruled out; so that unless your Honor otherwise indicates, I do not suppose you would care to hear any further discussion or argument.

The Court. No. I shall sustain the objection. You do not object to the form of the offer of proof?

Mr. Holtzoff. No, I do not.

The Court. I shall receive the offer of proof, and rule as I have before about the admissibility of evidence proposed to be offered. And you have your exception.

Mr. Acheson. Your Honor, I now wish to offer in evidence a telegram from Spokane, Washington, dated November 7, 1934, to the Honorable Harold L. Ickes, Public Works Administrator, Washington, D. C., signed by F. T. Post, President of the Washington Water Power Company, and also a reply telegram, dated Washington, D. C., November 12, 1934, directed to Mr. Post and signed "Harold L. Ickes, Administrator."

The purpose of offering these telegrams is that we have had a great deal of testimony as to what the Electric Power Board of Review has done, which has been excluded. But here is a case where what the Electric Power Board of Review has done, is stated by Mr. Ickes, himself.

Mr. Holtzoff. If your Honor please, we object to the documents offered, on the ground that they are not related to this case; they relate to a project other than that in this suit. And your Honor has heretofore held that such
426 matters are not admissible.

The Court. I shall sustain the objection.

Mr. Acheson. May I have the telegrams marked for identification, and note an exception to the Court's ruling?

Whereupon telegram dated Spokane, Washington, November 7, 1934, to Honorable L. Ickes from F. T. Post, President, The Washington Water Power Company, was thereupon marked Plaintiffs' Exhibit No. 231 for identification, and telegram dated Washington, D. C., November 12, 1934, to F. T. Post, President, The Washington Water Power

Company, Spokane, Washington, from Harold L. Ickes, Administrator, was marked Plaintiffs' Exhibit No. 232 for identification.

Plaintiffs Exhibit No. 231 for identification is as follows:

"Spokane, Washington.
November 7, 1934.

Honorable L. Ickes
Public Works Administrator
Washington, D. C.

Congressman White of Idaho has recently stated publicly that Public Works Administration has approved application City of Coeurdalene, Idaho, for loan and grant to be used for construction Diesel engine electric generating plant and distribution system in competition with our efficient hydro system stop Feel sure this application has not been called to your attention because its approval would violate statement of principles contained in Public Works Administration press release number nine eighty nine dated September twenty-seventh nineteen thirty-four stop Our present rates in Coeurdalene are among the lowest in the United States and regulated by Idaho Public Utilities Commission stop Application of the City of Coeurdalene for loan and grant which we had an opportunity to answer does not contain any schedule of rates which City
427 purposes to put in force if PWA shall loan and give it money with which to build system to operate in competition with our company therein stop We have never seen any schedule of rates proposed by the City and it is impossible for the City to make this proposed project self-liquidating under schedules of rates lower than ours stop Construction of Diesel engine plant in Coeur d' Alene at this time would seem to violate all the principles contained in your press release and in other releases of the PWA not only because of the situation outlined above but also because there is at the present time in this territory a large surplus of hydro generated electrical energy which will be greatly augmented by the Government through the Grand Coulee development stop Feel sure you have no intention to depart from previously announced policies and that Coeur d' Alene application will not be granted stop Shall

greatly appreciate assurance that this situation will be given your personal attention and I will esteem it a privilege to have the opportunity of a personal interview and discussion of whole problem with you.

F. T. Post President The Washington
Water Power Company."

Plaintiffs' Exhibit No. 232 for identification is as follows:

"Postal Telegraph

Washington, D. C.
November 12, 1934.

C 47 58 Govt.
F. T. Post
President, The Washington Water Power Company
Spokane, Washington

Retel seventh Docket 6695 Coeur d'Alene City's proposed electric rates contemplate twenty percent reduction stop Proposed water deemed better quality than yours stop You have already had opportunity meet City's proposals however if your company places in effect rate 428 reduction equal or greater than that of City, Electric Power Board of Review will consider matter further.

HAROLD L. ICKES, *Administrator.*"

Mr. Acheson. Now, your Honor, we have subpoenaed from the defendants all the orders and findings of the President, the Administrator, the special Board of Public Works, and other agencies or officials having the authority to make ultimate determination relative to the allocation of funds to non-Federal electricity projects in the 11 cities which are involved in this suit.

In response to that subpoena, Mr. Frank has furnished me with the documents. And in lieu of having a witness on the stand to bring out the fact that these are all the documents of the character described, I have explained to Mr. Frank, and I think we are prepared to agree, upon the record, that this file of documents which I shall immediately introduce and describe, represents all the orders and findings of the President, the Administrator, the special Board

of Public Works, and other agencies or officials having authority to make ultimate determinations in regard to all the projects which are involved in this litigation.

Mr. Frank says that is correct.

Whereupon there was received in evidence Plaintiffs' Exhibit 233 a document entitled "Non-Federal Public Works that are deemed desirable, List No. 23, recommended by the Special Board for Public Works. Confidential. November 23, 1933." Inside the cover of this document is a page which has the same title on it; then a page and a half list which is entitled at the top "Non-Federal Public Works that are Deemed Desirable. November 23, 1933." There are four columns in the list. The first column is headed "Docket." The second column is headed "Location." The third column is headed "Project." The fourth column is headed "Amount."

Under the first column is given the docket number;
429 under the second column, the town and state where the project takes place; under the third column is the kind of project that it is, such as a toll road, a water system, sewerage system, electricity project. Under the fourth column is the amount in dollars; and following the amount are either the letter "L", which means "Loan", or the letters "L and G" which mean "Loan and Grant", or the letter "G" which means "Grant."

On the second page of these two pages of lists appear these entries:

"Docket No. 3124. Location, Sheffield, Alabama. Project, Light System. Amount, $230,000", followed by the letters "L and G". Under that appears "Docket No. 3125. Location, Tuscumbia, Alabama. Project, Light system. Amount, $130,000", followed by the letters "L and G."

There is then one other entry, and then there is the total of all the dollars in that list. At the bottom of that page, in pencil, are the letters "O. K", and under that "F. D. R."

Following that page and a half of list there is a separate sheet for each item listed. On sheet numbered 40 appears the following:

"City of Sheffield, Colbert County, Alabama

"State City or Locality Project Amount

"Alabama Sheffield. For the installation of an electric transmission line from Muscle Shoals to Sheffield, construction of a sub-station and a complete electric distribution system. This application supercedes the application as submitted under Docket No. 2979, by the City of Sheffield, Colbert County, Alabama, substantially in accord with Docket No. 3124. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the Administrator between the United States and the City of Sheffield, County of Colbert, Alabama."

430 The next page is numbered 41 and on it appears the following:

"City of Tuscumbia, Colbert County, Alabama

"State City or Locality Project Amount

"Alabama Tuscumbia For the installation of an electric transmission line from the City of Sheffield, construction of a substation and electric distribution system. This application supercedes the application as contained in Docket No. 2996, by the City of Tuscumbia, Colbert County, Alabama, substantially in accord with Docket No. 3125. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the execution of a contract satisfactory to the Administrator, between the United States and the City of Tuscumbia, Colbert County, Alabama.

"Not to exceed $130,000.

Plaintiffs' Exhibit 234

There was then received in evidence as Plaintiffs' Exhibit 234 entitled "Non-Federal Public Works that are deemed Desirable, List No. 42, Recommended by The Special Board for Public Works, Confidential, January 9, 1934." This list has a page inside the cover on which appear the words quoted above, with the addition that under those words there are the letters "O.K. F.D.R." That is all that appears on the second page.

There then follows the same sort of list described in connection with the preceding exhibit, two and a half pages long, on page 5-B appears the following item:

"Docket No. 4259. Location, Florence Alabama. Project, Electrical system. Amount, $412,000 L & G." There then follow separate sheets relating to each item on the list; and on page 52-B, as the sole matter on that page is the following:.

431 "City of Florence, Lauderdale County, Alabama

"State City or Locality Project Amount

"Alabama Florence For the construction of an electrical distribution system, a central substation of 3,000 K V A feeder circuits from the Government reservation at Muscle Shoals office building and warehouse, by the City of Florence, Lauderdale County, Alabama, substantially in accord with Docket No. 4259. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the execution of a contract satisfactory to the Administrator, between the United States and the City of Florence, Lauderdale County, Alabama.

"Not to exceed $412,000"

Plaintiffs' Exhibit 235

There was then received in evidence as Plaintiffs' Exhibit 235 a document entitled "Non-Federal Public Works That are Deemed Desirable, List No. 53, Recommended by the Special Board for Public Works, Confidential, February 1, 1934." This list first contains a tabular statement on page 2-A of which one of the items is "Docket 4259. Location, Florence, Alabama." Under that is the word "Amendatory." Project, Electrical system. Amount, $24,000 L and G." At the bottom of that page there are the letters "O. K. F.D.R."

On page 36-A there is the following:

"City of Florence, Lauderdale County, Alabama

"State City or Locality Project Amount

"Alabama Florence For the construction of an electrical distribution system, a central sub-station of 3,000 KVA, feeder circuits from the Government Reservation at Muscle Shoals, office building and warehouse, by the City of Florence, Lauderdale County, Alabama, substantially in

accord with Docket No. 4259. This allotment is in addition to allotment approved by the Special Board on
432 January 9, 1934, in the amount of $412,000. This allotment is to be in the way of a loan and grant to aid the financing of such project subject to the execution of a contract satisfactory to the Administrator, between the United States and the City of Florence, Lauderdale County, Alabama.

Not to exceed $24,000.

Plaintiffs' Exhibit 236

There was then received in evidence as Plaintiffs' Exhibit 236 entitled "Non-Federal Public Works That are Deemed Desirable, List No. 69, Recommended by the Special Board for Public Works, Confidential, March 21, 1934."

The Court. What is the significance of that word "Confidential"? That has appeared in them all.

Mr. Holtzoff. I am told by Mr. Sher, of the Public Works Administration's Legal Division, that the real significance of that was that until the President approved this list it was to be regarded as confidential.

List No. 69 has two and a half pages of tabulation, docket numbers of projects and amounts. On the first page of that tabular statement, which is numbered C-2 in the list there appears the following, among others:

"Docket No. 1820, Hominy, Okla. Project, Distribution. Amount, $150,000. L and G."

There then follow page C-3, which has the same sort of lists, and C-4, and on page C-4, directly under the total of this list, there appear the letters "O.K. F.D.R."

There are then several separate pages, one page for each item on the list. It reads as follows:

"Federal Emergency Administration
of Public Works

"Washington, D. C.

433 "Resolution of Special Board for Public Works
"Re: City of Hominy, Oklahoma

"Resolved that the Administrator and the Special Board include in the comprehensive program a project for the

construction of a 900 brake H. P. plant and distribution system, by the 'City of Hominy', Oklahoma, substantially in accord with Docket No. 1820, and allot a sum not to exceed $150,000, for the purpose of aiding by way of a loan and grant, the financing of such project, subject to the execution of a contract satisfactory to the Administrator, between the United States of America and the 'City of Hominy'."

Mr. Acheson. I have just read to your Honor a resolution. There is a similar resolution relating to each project on the list, on a separate page, in this so-called Presidential Book or List No. 69. I am informed that there is a minute in the minutes of the Special Board for Public Works which states that all of these resolutions in List No. 69 are presented to the Board at one time in this form and are passed by the Board.

That is a correct statement, is it not?

Mr. Frank. That is correct.

Plaintiffs' Exhibit 237

There was received in evidence as Plaintiffs' Exhibit 237 a list entitled "Non-Federal Public Works That are Deemed Desirable, List No. 1[illegible]5, Recommended by the Special Board for Public Works, Confidential, August 15, 1934."

The tabular statement or list of projects begins on page numbered 2 of this exhibit on which is this item:

"Docket No. 6587. Location, Decatur, Alabama. Project, Power. Amount, $350,000 L & G."

The list continues on and ends on page numbered 3 and is totaled on that page, and under that total appear the letters "O.K. F.D.R."

434 There then follow pages on which resolutions occur for each of the projects contained in the list, and on page numbered 25 is the following:

"Federal Emergency Administration of Public Works

Washington, D. C.

"Resolution of Special Board

"Subject: Docket No. 6587, Decatur, Alabama.

"Whereas the Electric Power Board of Review and the Deputy Administrator recommend that the project of the

city of Decatur, Alabama, for the construction of an electrical distribution system, including the low side of the substation and equipment, be included in the comprehensive program of public works for the reason, among others, that the Tennessee Valley Authority has acquired the necessary transmission lines to serve said distribution system and the financing of said project will aid said Authority in obtaining a market for its electrical energy:

"Resolved that said project be included in the comprehensive program and that the sum of $350,000 (of which not to exceed $100,000 shall be a grant) be allotted to finance the accomplishment thereof, subject to the execution of a contract satisfactory to the Administrator and in accord with the recommendations of the Electric Power Board of Review dated June 22, 1934, as amended by its report of July 30, 1934.

The Court. What is that term "low side"?

Mr. Baker. It means low tension current, your Honor.

Plaintiffs' Exhibit 238

There was then received in evidence as Plaintiffs' Exhibit 238 a document entitled "Public Works Projects that are Deemed Desirable, Federal List No. 120; Non-Federal Lists Nos. 207-213, Recommended by The Special Board for Public Works, March 27, 1935."

This exhibit is made up of eight lists bound together. In about the middle of the exhibit is list 212. It begins
435 with a page entitled "Non-Federal Public Works That are Deemed Desirable, List No. 212, Recommended by the Special Board for Public Works, Confidential, March 27, 1935." On page 2 of that list begins the tabular statement. On page 3 there is this item, among others:

"Docket No. 8021. Location, Plainview, Texas Project, Generating Plant. Amount, $423,346. L & G."

On page 5 the tabular statement comes to an end, a total appears, and under that is the following writing: "O.K. in principle. Subject to unemployment check F. D. R."

Under that, in writing: "Unemployment check is now satisfactory and projects are approved. F. D. R."

Following that statement there is a separate resolution for each item on the list. On page numbered E 227 there appears the following:

"Federal Emergency Administration of Public Works

Washington, D. C.

"Resolution of Special Board for Public Works

"Re: City of Plainview, Texas

"Resolved that the Administrator and the Special Board include in the comprehensive program a project for a Diesel electric generating plant and distribution system including street lighting by the 'City of Plainview', Texas, substantially in accord with Docket No. 8021, and allot a sum not to exceed $423,346, for the purpose of aiding by way of a Loan and Grant, the financing of such project, subject to the execution of a contract, satisfactory to the Administrator between the United States of America and the 'City of Plainview'."

Plaintiffs' Exhibit 239

There was then received in evidence as Plaintiffs' Exhibit 239 a letter to which there is attached a tabular statement.

436 "The White House
Washington

"August 15, 1934.

"My dear Mr. Secretary:"—

By virtue of the authority vested in me under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, it is requested that the following funds be transferred from the appropriation made in said Act to the Public Works Administration for the purpose indicated below:

Amount; $15,659,882.

Purpose: For financing by way of a grant projects of States, Territories, Possessions, subdivisions or agencies thereof, in accordance with the attached schedules of projects. Subject to the application of Title III of the Treasury and Post Office Appropriation Act, fiscal year 1934, to the acquisition of articles, materials and supplies for use in carrying out such projects. (O.P. No. 52-358 to 52-413)

"I have determined with respect to each of the projects listed on the attached schedule that not less than 25 per centum of the grant is to be expended for work under each particular project.

"Sincerely yours,

(Signed) "Franklin D. Roosevelt."

The Honorable,
The Secretary of the Treasury.

The tabular statement attached to the letter is entitled "Public Works Administration". Under that appears "In accordance with docket of Non-Federal projects indicated below." There are then six columns headed: "Location"; "Character of Work"; "Docket Number"; "Allotment"; and "N. E. C. Number." "N. E. C." means "Na-
437 tional Emergency Council." The last column is headed "Project Number."

There are several pages of items. On the last page the last item is as follows:

"Location, Iowa. Iowa City, Johnson Co. Construction of steam-electric power-house, boilers, generators and complete electric distribution system, Docket Number 7738, allotment $413,000, N. E. C. Number 3907, Project Number O. P. 52-413."

Whereupon counsel for plaintiffs called upon counsel for defendants to produce the two reports Electric Power Board of Review dated January 22, 1934, and July 30, 1934, referred to in the resolution contained in Plaintiffs' Exhibit No. 237. The documents having been produced, that entitled "Electric Power Board of Review," referring to application of the City of Decatur, Alabama, dated January 22, 1934, was marked "Plaintiffs' Exhibit No. 237-A" and received in evidence, and a Resolution with reference to Decatur, Alabama, Docket No. 6587, dated July 30, 1934, was marked "Plaintiffs' Exhibit No. 237-B" and received in evidence.

The Exhibits are as follows:

Plaintiffs' Exhibit 237-A

"Electric Power Board of Review

Jan. 22, 1934.

Subject: Application for loan and grant of the City of Decatur, Alabama (Docket No. 6587) for the purpose of constructing distributing system, including low side of the substation and equipment, in the sum of $371,743.

After review of the Docket, this Board finds:

1. The Engineering Division by its supplemental report made the following conclusion and recommendation:

'It is our opinion that the proposed project is a public necessity and of social desirability; that it will afford needed employment; and that on the above assumptions it is technically and economically sound.''

438

The assumptions referred to are that

(a) ''The municipal plant will receive, in addition to all the municipal load, 60 percent of all other business in the first year of operation, and 80 percent at the end of the loan interval.''

This assumption, in the opinion of this Board, is far below that portion of the total business the municipality will receive, inasmuch as it will offer rates at least 60 percent less than the present rates being charged by the Alabama Power Company by reason of the contract offered the City by the T. V. A.; and as the Alabama Power Company, the competitor, cannot reduce its rates by anything like 60 percent of its present rates by reason of its service to the City of Birmingham, and as it would be under the necessity of reducing its rates to other cities served by it in Alabama. If rates required by the T. V. A. contract are charged and the City obtains the same business the Company now has, its income will provide for maintenance and operating costs, interest, amortization and taxes, and a net income over all of $10,525. This appears by the estimate of O. M. Rau attached. This estimate makes no allowance for what may reasonably be expected in the way of an increase of current sold and of income by reason of the heavy reduction of rates. That a reduction of rates produces larger net income is shown, among other examples, by the experience of the City of Washington under its contract with the Potomac Electric Company covering the years 1925 to 1934. Under this contract the Company is required to apply one half its surplus to rate reduction. The maximum rate in 1924 was 10c per KWH. Rates are now, after successive reductions, 3.9c for the first 50 KWH, 3.3c for the next 50, 2c for the next 100 and 1.5c for all over 200. In 1924 the Company earned 3.4 times its bond interest after allowing for depreciation and taxes. In 1932 with rates cut to one third it earned its interest twelve times. Earnings per share increased from $26.90 in 1924 to $68.08 in 1932. The privately owned electric company in Hartford, Connecticut, has had a like experience. Hence this Board finds that the

439

assumption of the Engineering Division on which it bases its conclusion that the project is technically and economically sound is far less favorable to the City than the facts warrant.

The same finding applies to the estimate of Mr. O. M. Rau. This Board is of opinion that during the first year after the City begins business it will have at least 75 percent of the business measured in dollars, and an increase of not less than 10 percent in each succeeding year. Accordingly it finds that the project is technically, economically and financially sound.

The said finding of financial soundness is supported by the report of the Finance Division dated April 12, 1934. This report was based upon a report of the Engineering Division dated March 6, 1934, a prior report to that referred to above and one less favorable to the City. The Finance Division report of April 12 found that on the basis of the division of business estimated by the engineer-examiner "50 percent of sales the first year and 75 percent the twentieth year and all municipal business," the project will earn only about 1.05 times the debt service for the first several years with a deficit for the first year. Inasmuch as the estimate of the engineer-examiner referred to has now been modified so that the estimate of division of business is altered to all the municipal load and 60 percent instead of 50 the first year, with an increase of 2 percent each year, it is obvious that the Finance Division would approve the loan on the revised basis. Furthermore, this Board is of opinion as stated above that even the revised estimate upward of the engineer-examiner is too low in view of the heavy
440 reduction of rates proposed. As stated above this Board is of opinion that the said reduction will increase the portion of the business obtained by the City and also the new revenue.

2. This Board has further reviewed the conditions attached to the report of the Engineering Division dated March 6, 1934, as follows:

"3a. The applicant shall furnish evidence satisfactory to the Administrator that the Alabama Power Company can be legally required to furnish service on a day to day basis until the acquisition by the municipality of the used and usable portions of the existing distribution system."

This condition having been reviewed by this Board is disapproved as impossible of performance; and the following condition substituted:

The applicant shall furnish evidence satisfactory to the Administrator that the Alabama Power Company can be legally required to furnish service on a day to day basis until the municipal system is ready for service.

This Board has reviewed the further conditions:

"3b. And that thereafter" (the acquisition of competitive system) "the Power Company will be without authority to sell power within the municipal limits."

This condition is also disapproved for the reason that it prevents any loan being made as such a showing involves a law suit and is probably impossible of performance as the Company has a franchise until October 1, 1949. If the T. V. A. fails to purchase the distribution system of the Company and the municipal system being under the necessity by its contract with T. V. A. of offering rates at least 60 percent less than existing rates, the Company, being unable to provide an equally low rate, will be unable
441 to continue to compete and must withdraw. Hence this condition should be stricken out.

This Board has further reviewed condition 4a of the engineer-examiner:

"(a) That no depreciation charges, taxes or any other items of expense, except normal operating expenses and power and lighting extensions shall be charged against the revenues of this project."

It approves this condition.

It has also reviewed condition 4b:

"That all municipally used electric energy shall be paid for at current selling rate schedules annually during the interval of the loan from the general fund into the account of this project."

This Board also approves this condition.

This Board finds also that the Engineering Division omitted to recommend a grant. Its report does not show any reason for this omission.

This Board finds that the applicant is as much entitled to a grant as other applicants to which grants have been allowed.

Resolved, that this Board recommend an allotment to the

applicant in the sum of $372,000, of which not to exceed thirty percent of the cost of the labor and materials employed thereon, estimated at $100,000, shall be a grant.

Henry T. Hunt
Chairman."

442 *Plaintiffs' Exhibit 237-B*

Federal Emergency Administration of Public Works

Electric Power Board of Review

Washington, D. C.

Decatur, Alabama, Docket No. 6587 July 30, 1934.

Resolution

Whereas, the Electric Power Board of Review under date of June 22, 1934, recommended an allotment to the applicant in the sum of $372,000 (loan and grant); and

Whereas, it now appears that a loan and grant in the sum of $350,000 should be sufficient:

Resolved, that this Board recommend a loan and grant to the City of Decatur, Alabama, Docket No. 6587, in the amount of $350,000.

Henry T. Hunt
Chairman.

Whereupon the following occurred:

Now, your Honor, I will refer to the resolution with reference to the City of Plainview which occurs in Plaintiffs' Exhibit No. 238 as a preface to a request. It says—

"Resolved that the Administrator and the Special Board include in the comprehensive program a project for a Diesel electric generating plant and distribution system including street lighting by the 'City of Plainview', Texas, substantially in accord with Docket No. 8021", etc.

I wish to request that what is referred to there as Docket 8021 be produced so that we may see what this project is to be substantially in accord with. I do not want to put a great burden on the Government, but I understood from the testimony of Mr. Wheeler on the stand that there were three reports, recommendations or statements which
443 summarized everything which is in the docket. One is the report of the Engineering Division; the next

one is the report of the Financial Division; the third one is the report of the Legal Division, and, possibly, if the project goes to the Electric Power Board of Review, the overruling or approval of the various statements which were made.

We think that when the resolution says that it approves a project substantially in accord with Docket No. so and so, we are entitled to have the salient features of that docket produced so that we may see exactly what the project is which the President has approved.

Counsel for defendants objected to the request upon the grounds that the documents requested were both irrelevant and confidential, intradepartmental communications. The matter was extensively argued by counsel.

The Court. I do not want to hear any more discussion. I am going to hold that you do not have to produce those papers. I think they are wholly immaterial.

Mr. Acheson. The record will show an exception?

The Court. Yes.

Mr. Acheson. Your Honor, May the record show that in the case of each project, wherever it appeared in the authorization that the Special Board of Public Works or the President approved a project "substantially in accordance with docket so-and-so", I asked to have produced the reports of the three examining commissions and of the Electric Power Board of Review, which have already been subpoenaed; that that was objected to by the defendants; and that the Court ruled that they need not produce those documents; and that I noted an exception?

The Court. You want an exception in each case?

Mr. Acheson. In each case, your Honor.

The Court. Very well. That may be understood.

444 *Plaintiffs' Exhibit 240*

There was then received in evidence as Plaintiffs Exhibit 240 a document entitled "Non-Federal Public Works That Are Deemed Desirable, List No. 255-A, Confidential, August 19, 1935", the first page of which reads as follows:

"Federal Emergency Administration of Public Works

Washington, August 19, 1935.

"Memorandum to accompany Non-Federal List No. 255-A.

"I hereby authorize and approve Project Orders contained on the attached List, providing $28,022,382, for the the purpose of aiding by way of Loans and/or Grants, the financing of 56 Non-Federal projects in various localities throughout the United States.

"(Signed) Harold L. Ickes, *Administrator.*"

"Attachment".

Then follows a long list of projects. On page numbered 3-57, there is the following:

"Federal Emergency Administration of Public Works

"Washington, D. C.

"Project Order of the Federal Emergency Administrator of Public Works

Re: Iowa City, Johnson County, Iowa

"Whereas, the Advisory Committee on Allotments has recommended and the President has approved the inclusion in the Works Program of a project for the construction of steam-electric power house, 3-300 Hp. boilers, 2-3000 Kw. generators and complete electric distribution system, by the Iowa City, Johnson County, Iowa, substantially in accord with P. W. A. Docket No. 7738, and

"Whereas, funds in the amount of $413,000, for
445 the purpose of aiding by way of a grant the financing of this project, have been made available from the Emergency Relief Appropriation Act of 1935 to this Administration; Now therefore

"It Is Hereby Ordered and Directed, that said project be included in the comprehensive program of Public Works and the above allocation utilized to aid the financing of such project, subject to the execution of an agreement satisfactory to the Administrator, between the United States of America and the Iowa City.

"Harold L. Ickes, *Administrator*

"Date of Order August 19, 1935."

Plaintiffs' Exhibit 241

There was then received in evidence, as Exhibit No. 241, a document entitled "Public Works Projects That Are Deemed Desirable, Federal List No. 142, Non-Federal List No. 264, Recommended by The Administrator of Public Works, September 21, 1935."

This document is made up of Federal List No. 142 and Non-Federal List No. 264. Non-Federal List No. 264 begins on page D-7, and consists of a tabular statement of various projects.

On page D-23 there is the following entry:

"Docket 7738
"Location Iowa City, Iowa
"Project Electric Plant and Distribution System
"Remarks Amendment in description to obviate unnecessary detail. No change in allotment."

On page D-26 there is a summary, as follows:

"Summary Sheet

"Increases in Allotments	$2,121,107.11
Reductions in Allotments and Rescissions	5,136,500.00
Net Reductions	$3,015,392.89

O. K.
F. D. R."

446 *Plaintiffs' Exhibit 242*

There was then received in evidence as Plaintiffs' Exhibit No. 242, a document entitled "Non Federal Public Works That are Deemed Desirable, List No. 264, Amendments, Rescissions and Specials, Confidential, September 24, 1935."

The first page consists of a document on the letterhead of the Federal Emergency Administration of Public Works, Washington, September 24, 1935:

"Memorandum to Accompany Non-Federal List No. 264

"I hereby authorize and approve Project Orders contained in the attached List affecting funds in the following manner:

"Increases in Allotments	$2,121,107.11
Reductions in Allotments and Rescissions	5,136,500.00
Net Reductions	$3,015,392.89

"(Signed) Harold L. Ickes, *Administrator*"

"Attachment"

Attached is a series of papers, similar in character, page 109 of which reads as follows:

"Federal Emergency Administrator of Public Works

"Washington, D. C.

"Project Order of the Federal Emergency Administrator of Public Works

Re: Iowa City, Johnson County, Iowa

"Whereas, by Project Order under date of August 19, 1935, the Administrator ordered that a project for the construction of steam-electric power house, 3-300 Hp. boilers, 2-300 Kw. generators and complete electric distribution system, substantially in accord with Docket No. 7738, be included in the comprehensive program of Public-
447 Works and that an allotment of $413,000, for the purpose of aiding by way of a grant, which was made available from the Emergency Relief appropriation of 1935 to this Administration, be utilized to aid in the construction of this project, and

"Whereas, it has been recommended that the above description of the project be amended to obviate unnecessary detail; Now therefore

"It Is Hereby Ordered and Directed, that an amendment be made to said Project Order by striking out the words 'for the construction of steam-electric power house, 3-300 Hp. boilers, 3-300 Kw. generators and complete electric distribution system', and inserting in lieu thereof the words 'for the construction and equipping of an electric plant and distribution system'.

"HAROLD L. ICKES, *Administrator.*

"Date of Order 9/24/35

"Date of Presidential Approval 9/24/35."

Plaintiffs' Exhibit 243

There was then received in evidence as Plaintiffs' Exhibit No. 243, a letter from the President to the Secretary of the Interior, to which is attached a large number of other documents.

"The White House
"Washington
"September 25, 1935

"My dear Mr. Secretary:

"Pursuant to the Emergency Relief Appropriation Act of 1935, I hereby:

"I. Approve the projects included in the program of public works set forth in the annexed 'Schedule A', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular
448 project.

"II. Allocate and transfer to the Federal Emergency Administration of Public Works, subject to agreements to be entered into with the United States of America satisfactory to you as Federal Emergency Administrator of Public Works:

"A. From funds appropriated by the Emergency Relief Appropriation Act of 1935, the sum of $200,139,036 to aid in financing the construction of the projects approved above by making a grant for each such project in the amount set forth in the grant column of Schedule A;

"B. From moneys realized from the sale of any securities acquired by the Federal Emergency Administration of Public Works, the sum of $88,701,481 to aid in financing the construction of such of the projects approved above as contemplate a loan by the Federal Emergency Administration of Public Works in the amount set forth in the loan column of Schedule A for each such project.

"III. Approve the projects included in the program of public works set forth in the annexed 'Schedule B', as to each of which I find and determine that not less than 25 per centum of the loan or grant, or the aggregate thereof, is to be expended for work under each particular project.

"IV. Authorize you as Federal Emergency Administrator of Public Works:

"A. To decrease, to amend, or to rescind any allotment

heretofore approved by me and made through, by or to the Federal Emergency Administration of Public Works pursuant to Title II of the National Industrial Recovery Act or pursuant to the Emergency Relief Appropriation Act of 1935, or made by this order or authorized to be made hereby; and to allocate or to re-allocate for any project or projects included in Schedule B:

"(1) Any funds now available to the Federal Emergency Administration of Public Works, or

449 "(2) Any funds made available by this order to said Administration, or

"(3) Any funds which may hereafter become available to said Administration by any decrease, amendment or rescission heretofore or hereafter made in respect of any such allotment, or

"(4) Any funds which may hereafter become available to me by the sale of any securities acquired by the Federal Emergency Administration of Public Works;

"B. To increase any allotment heretofore approved by me and made through, by or to the Federal Emergency Administration of Public Works pursuant to Title II of the National Industrial Recovery Act or pursuant to the Emergency Relief Appropriation Act of 1935, or made by this order or authorized to be made hereby; and to use for such purpose:

"(1) Any funds now available to the Federal Emergency Administration of Public Works, or

"(2) Any funds made available by this order to said Administration, or

"(3) Any funds which may hereafter become available to said Administration by any decrease, amendment or rescission heretofore or hereafter made in respect of any such allotment, or

"(4) Any funds which may hereafter become available to me by the sale of any securities acquired by the Federal Emergency Administration of Public Works;

"C. To delegate to the Assistant Administrator, Federal Emergency Administration of Public Works, the powers hereby conferred.

"Very sincerely,

"(Signed) Franklin D. Roosevelt

"The Honorable,

"The Secretary of the Interior."

450 Schedule A attached to the letter consists of a great number of sheets, grouped in order of States, in alphabetical order. In that part headed "Alabama", on page 2 thereof, there appears the following:

"Docket Number	7032
"Location	Russellville
"Type	Elec. Dist."—

which means Electric Distribution—

"Loan	69000
"Grant	56454
"Est. Cost	125454
"Grant Cost Man-Yr.	441
"Start Days	——
"Weeks to Complete	——
"No. Men on Work	256
"County Code	030"

On the page, "Alabama—Page 3", appears this:

"Docket Number	7341
"Location	Guntersville
"Type	Elec. Dist.
"Loan	48000
"Grant	39272
"Est. Cost	87272
"Grant Cost Man-Yr.	584
"Start Days	——
"Weeks to Complete	——
"No. Men on Work	135
"County Code	048"

And on page "Alabama—Page 4" appears:

	"Docket Number	6611
	"Location	Hartselle
	"Type	Dist. Syst.
451	"Loan	33000
	"Grant	27000
	"Est. Cost	60000
	"Grant Cost Man-Yr.	394
	"Start Days	15
	"Weeks to Complete	26
	"No. Men on Work	137
	"County Code	052"

Plaintiffs' Exhibit 244

There was then received in evidence as Plaintiffs' Exhibit 244, a letter dated October 28, 1935, from the President to The Secretary of the Treasury, with attached papers:

"The White House

Washington

Oct. 28, 1935

"My dear Mr. Secretary:

"By virtue of the authority vested in me under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, it is requested that the following funds be transferred from the appropriation made in said Act to the Public Works Administration for the purposes indicated below:

"Amount: $175,000,000

"Purpose: The funds allocated hereby, together with any funds heretofore allocated by me for financing projects of the Public Works Administration by way of a grant shall be available for financing by way of grants (1) any or all of the projects, aggregating $175,331,395, set forth in the attached schedule of projects, and/or (2) any or all projects set forth in any schedule of projects to be financed by way of a grant heretofore approved by me; provided that the amount expended upon any one project shall not exceed the amount indicated therefor in such schedule of projects. Subject to the application of Title III of
452 the Treasury and Post Office Appropriation Act, fiscal year 1934, to the acquisition of articles, materials and supplies for use in carrying out such projects. (2999 projects)

"I have determined with respect to each of the projects listed on the attached schedule that not less than 25 per centum of the grant is to be expended for work under each particular project.

"Sincerely yours,

"(Signed) Franklin D. Roosevelt

"The Honorable,

"The Secretary of the Treasury."

Among the papers attached to that letter of the President, on page 4 there is the following:

"In accordance with docket of Non-Federal Projects below

"Alabama

"Location	Russellville, Franklin County
"Character of Work	Construction of Distribution System to distribute TVA energy.
"Docket Number	7032
"Allotment	56,454
"N. E. C. Number	13707
"Project Number	O.P. 52-922"

On page 6:

"In accordance with docket of Non-Federal Projects indicated below

"Alabama

"Location	Guntersville, Marshall County
"Character of Work	Construction of Electric Distribution system for city of 3,000.
"Docket Number	7341
"Allotment	39,272
"N. E. C. Number	15105
453 "Project Number	O.P. 52-914"

And on page 7, with the same heading:

"Location	Hartselle, Morgan County
"Character of Work	Construction of Substation and Electric Distribution System.
"Docket Number	6611
"Allotment	27,000
"N. E. C. Number	16091
"Project Number	O.P. 52-923"

Plaintiffs' Exhibit 245

There was then received in evidence, as Plaintiffs' Exhibit No. 245, a document entitled "Non Federal Public Works, List No. 1014, for approval of the Administrator, December 4, 1935."

The first page is:

"Federal Emergency Administrator of Public Works

"Washington
December 4, 1935

"Allotment Order for Non-Federal List No. 1014

"Pursuant to the authority vested in me by Executive Order of the President No. 7064, dated June 7, 1935, I hereby allocate to the projects included in the annexed Non-Federal List No. 1014 (each of said projects having been heretofore approved by the President):

"A. From funds appropriated by the Emergency Relief Appropriation Act of 1935 and heretofore transferred to the Public Works Administration pursuant to direction of the President, the sum of $5,219,529, to aid in financing the construction of said projects by making a grant for each such project in the amount set forth in the grant column of said list.

"B. From moneys realized from the sale of any securities acquired by the Federal Emergency Administra-
454 tion of Public Works, the sum of $2,477,500, to aid in financing the construction of such of the projects included in said list as contemplate a loan by the Federal Emergency Administration of Public Works, by making a loan to each such project in the amount set forth in the loan column of said list;

"Subject to the execution of agreements satisfactory to the Administrator, between the United States of America and the respective applicants therefor.

"(Signed) Harold L. Ickes
"*Administrator.*

"Attachment."

On page 2-16, appears the following:

"Approved by the Adminitrator of Public Works for Inclusion in Schedule 'A', as Part of Works Program.

Non Federal List No. 1014

Alabama

"Location: Russelville, Franklin Co.
"Character of Work:
Construction of distribution system to distribute TVA energy
"Docket Number: 7032
"Grant Amount: $56,454
"Loan Amount: $69,000."

On the next page, under the same headings:

"Location: Guntersville, Marshall Co.
"Character of Work:
Construction of Electric Distribution system for city of 3,000
"Docket Number: 7341
"Grant Amount: $39,272
"Loan Amount: $48,000."

455 On the next page is Hartselle:

"Location: Hartselle, Morgan Co.
"Character of Work:
Construction of substation and electric distribution system.
"Docket Number: 6611
"Grant Amount: $27,000
"Loan Amount: $33,000."

456 **Richard L. Harkness**

was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

I live at 2928 P Street, Washington. I am a newspaper man for the United Press. I have been in Washington, for the United Press since November, 1934. During that time, my duties required me to cover the Public Works Administration and other agencies concerned with work relief. I have attended the press conferences held by the Administrator, Mr. Ickes. I wrote the press dispatch handed to me, dated December 21, 1934, following a press conference held by Mr. Ickes. At that conference, Mr. Ickes said that

he would refuse to make allotments for municipal power plants where the private utility, the existing utility, rates were below the rates to be charged by the projected municipal plant. He said that the reasonableness of private utility rates would be one of the determining factors in consideration of loan and grant applications. By that, I mean the reasonableness of the private utility rate in the town which applied for the loan and grant. Mr. Ickes made this statement more than once. I could not estimate how many times, although it has run repeatedly through his discussion of municipal power plants, and his program. I attended a press conference about August 20, 1935, at which Mr. Ickes announced the loan and grant which he had made to Iowa City. At that conference he said this: that municipalities in some instances could afford to pay something to have private untilities out of their city and not meddle in politics and government. As I remember it, he did not say that specifically regarding Iowa City. He said that the City of Chicago could well have afforded to have paid something to Mr. Insull—could have afforded to have paid something to keep him in Greece, to have built him an acropolis.

457 *Cross Examination*

At these press conferences it is usually the practice for the newspaper men to ask questions of the Administrator, and most all of that occurs in the form of brief answers to questions.

Q. When Mr. Ickes, on these occasions to which you refer, spoke of the competitive rates, did he not in the same context indicate that his interest therein as Administrator had to do with the security of the loan? A. Well, Mr. Ickes has always, according to my impressions from what he has said, held the ability of the project to be self-liquidating, one of the prime requirements of any project.

458 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #119 Circular No. 1 of the Federal Emergency Administration of Public Works, being "The Purposes, Policies, Functioning and Organization of the Emergency Administration, and Rules Prescribed by the President, July 31, 1933," published by the Government Printing Office.

"Article I.

Circular No. 1 states the purposes of the National Industrial Recovery Act (title II, Public Works), and the purposes, policies, functioning, and organization of the Emergency Administration of Public Works, created by the President to effectuate title II.

It also states the rules and regulations prescribed by the President pursuant to section 209, as necessary to carry out the purposes of the title. These rules and regulations control all contracts let for construction of public works, financed under the act, whether Federal or non-Federal, and all loans and grants pursuant to title II. Any violation of any such rule or regulation is punishable by fine not to exceed $500 or imprisonment not to exceed 6 months, or both.

Section 1. *Purposes of title II of the act.*—(1) The comprehensive program of public works. The act (sec. 201) provides that the Administrator, under the direction of the President, shall prepare a 'comprehensive program of public works'. The comprehensive program is to be related to the reconstruction legislation of which the Recovery Act is a part. The purpose underlying the entire scheme is, as stated in the declaration of policy of the Recovery Act, 'to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'

459 The formulation of a comprehensive plan of public works thus requires consideration of the functioning of the national economy as a whole. This in turn involves consideration of ascertained trends of population and industry, its centralization and decentralization, changes in the habits of the people caused by the substitution of the machine for human labor, the automobile, changes in railroad rates, in charges for electric current, the effect of massive projects like Boulder Dam, Tennessee Valley, and the St. Lawrence River improvement.

The formulation of the immediate comprehensive plan (which is necessary to provide employment quickly) involves the formulation of a long-range national plan to follow and be consistent with the immediate plan. To that end

the President has directed the creation of a long-range planning board more particularly described later.

Obviously the purpose of the act to provide employment quickly cannot await the complete formulation of the comprehensive program. But it is possible to select projects which will be consistent with such program when formulated. The President and the Emergency Administration under his direction will not await complete formulation, but, 'with a view to increasing employment quickly, while reasonably securing any loan made by the Administrator', will aid in the construction and financing of any public works project deemed worthy of inclusion (sec. 203.).

The policies adopted by the Administrator, by the authority of the President, hereinafter set forth, are designed to provide an immediate program, Federal and local.

Sec. 2. The duty and function of the Emergency Administration as to Federal projects and/or public works is to determine eligibility from the standpoint of national planning, and to determine and effectuate allotment of funds appropriated under the act, and to aid in ob-
460 taining compliance by Federal contractors with the rules prescribed by the President. It is not necessary to describe this process in detail in this circular.

Sec. 3. But as to non-federal projects it is necessary to describe the duties, powers, organization, and functioning of the Administration.

The classes of non-Federal projects (public works) eligible for loans under the act are set forth in section 202.

(a) Construction, repair, and improvements of public highways and parkways, public buildings, and any publicly owned instrumentalities and facilities (such as bridges, tunnels, docks, viaducts, waterworks, electric power and light plants, canals, markets, etc.)

Note.—$400,000,000 has been allotted for highways under another section of the act. This allotment does not preclude consideration of additional highways and parkways.

(b) Conservation and development of natural resources, including the control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, river and harbor improvements and flood control, and also the construction of any river or drainage improvement, required to satisfy

any obligation incurred by the United States through a treaty with a foreign government, heretofore ratified, and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations, heretofore assumed.

Note.—The State Advisory Board, later described, will instruct projectors of river and harbor improvements and of the river or drainage improvements pursuant to treaties to forward their applications direct to the Administrator.

(c) Any projects of the character heretofore con-
461 structed or carried on either directly by public anthority or with public aid to serve the interest of the general public.

Note.—As to such projects not constructed or carried on directly by public authority, see Part 2 of this circular.

(d) Construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum clearance projects.

Note.—See Part 3 of this circular.

(e) Any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932 as amended, and paragraph 3 of such subsection (a), shall for such purposes be held to include loans for the construction or completion of hospitals, the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks.

Note.—Such hospitals, reservoirs, pumping plants, and dry docks are thus within the classes eligible for loans. See Part 2 of this circular.

Other classes of projects, not included in (a)-(e) of section 202, and enumerated in the Emergency Relief and Construction Act are:

(1) Loans to private corporations to aid in carrying out the construction, replacement, or improvements of bridges, tunnels, docks, viaducts, waterworks, canals, and markets devoted to public use and which are self-liquidating in character.

(2) To make loans to private limited-dividend corporations to aid in financing projects for the protection and de-

velopment of forests and other renewable natural resources
which are regulated by a State or political subdi-
462 vision of a State and are self-liquidating.

Note.—As to (1) and (2), see Part 2 of this circular.

Returning to the Recovery Act itself, section 203 (a) (4) empowers the President, through the Administrator, to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

Note.—State advisory boards are not concerned with applications by railroads for financing railroad maintenance and equipment. Such applications are to be made direct to the Administrator. A separate circular will be issued on railway maintenance and equipment.

Sec. 4. *President's power to make grants to public bodies.*—Excerpts from the act relevant to the grant follow:

'* * * The President is authorized and empowered * * * upon such terms as he shall prescribe to make grants to States, municipalities, and other public bodies for the construction, repair, or improvement of any such project (those within (a)-(e) above), but no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project' (sec. 203(a)).

'Provided that in deciding to extend any aid or grant to any State, county, or municipality the President may consider whether action is in process or in good faith assured therein, reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof' (sec. 203 (a)).

Sec. 5. *Other powers of the President.*—(a) He may extend the benefits of the title to public bodies notwithstanding limitations on their power to borrow.

'The President, in his discretion, and under such
463 terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur any indebtedness' (sec. 203(a)).

This provision is related to the leasing provision of the act which follows.

(b) The President has power also to acquire any real or personal property in connection with any projects within the classes (a-e, above) approved by him to construct or finance the construction thereof and to lease such projects with or without privilege of purchase as appears by the following excerpt:

'The President is authorized and empowered * * * (3) to acquire by purchase, or by the exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project or (and) to lease any such property with or without the privilege of purchase * * *' (sec. 203(a)).

(c) The President may sell any security or property acquired:

* * * The President is authorized and empowered * * * to sell any security acquired (in connection with loans made by the United States under the act), or any property so constructed or acquired (by purchase or by exercise of the power of eminent domain) in connection with the construction of any project' (sec. 203(a)).

(d) Power of President to prescribe rules:

'The President is authorized to prescribe such rules and regulations to carry out the purposes of this title and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to
464 exceed six months or both (sec. 209)

The act throughout is permissive only. The President may exercise all, any, or none of the powers it invests in him.

Sec. 6. The Executive orders appointing the Special Board for Public Works and an Administrator.

The President has appointed a Special Board for Public Works consisting of the Secretary of the Interior, chairman, the Attorney General, the Secretaries of War, Agriculture, Commerce, and Labor; the Director of the Budget, Henry M. Waite (Deputy Administrator), and Assistant Secretary of the Treasury Roberts.

On July 8, 1933, the President appointed Harold L. Ickes (Secretary of the Interior) as Administrator to exercise the powers of that office.

The President has prescribed rules and regulations to carry out the purpose of the title. (See art. 2, sec. 3.)

The Administrator, with the approval of the President, has adopted policies to control the administration of the act.

Article II. Policies of the Emergency Administration of Public Works

Section 1. Labor policy.

(1) Opportunities for employment on projects authorized under the Emergency Administration of Public Works shall be equitably distributed among the qualified workers who are unemployed, not among those who merely wish to change one good job for another.

(2) These work opportunities shall be distributed, geographically, as widely and as equitably as may be practicable.

(3) Qualified workers who, under the law, are entitled to preference shall secure such preference.

465 (4) The wasteful cost and personal disappointments due to excessive increase of labor in the vicinity of work projects shall be avoided.

(5) Local labor required for such projects and appropriately to be secured through employment services, shall, as far as practicable, be selected from lists of qualified workers submitted by local employment agencies designated by the United States Employment Service. Highly skilled or organized labor shall not be required to register for work at such local employment agencies, but shall be secured in the customary ways through recognized trade-unions locals. In the event such highly skilled organized workers are not furnished by such locals within forty-eight hours after request is filed with them, then such workers shall be obtained through local employment agencies designated by the United States Employment Service.

Section 2. 'All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted

to work more than 30 hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order; (a) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political
466 subdivisions and/or county in which the work is to be performed, and (b) citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided,* That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage' (sec. 206)

Sec. 3. Rules prescribed by the President to carry out the purposes of title II (sec. 206).

(1) No convict labor shall be employed on any project financed in whole or in part by funds provided by the United States.

No materials manufactured or produced by convict labor shall be used on any projects so financed.

Violation of this rule may be notified by the agency of the United States, executing the contract, to the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(2) Thirty-hour week so far as practicable and feasible. This requirement shall be construed to permit hours of work per week as provided for any class of labor in the code covering such class, adopted pursuant to title I of this act. If the class of labor be not covered by such code then persons in classes not covered shall be permitted to work only 30 hours per week. This requirement shall be construed:

(a) To permit working time lost because of inclement

weather or unavoidable delays in any one week to be made up in the succeeding week or weeks of any calendar month.

467 (b) To permit the limitation of not more than 130 hours' work in any one calendar month to be substituted for the requirement of not more than 30 hours' work in any one week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

It shall not be considered practicable and feasible to apply either of these limitations to work located at points so remote and inaccessible that camps are necessary for the housing and boarding of all the labor employed and if so determined by the State engineer (P.W.A.) prior to advertisement: *Provided,* That in such cases no individual shall be permitted to work more than 8 hours in any one day or more than 40 hours in any one week.

Violations of this rule may be notified by the Administrator or by the agency of the United States executing the contract to the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(3) Just and reasonable wages. Such wages shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort.

Note.—It is intended that schedules will be furnished the State advisory boards and the State engineer (P.W.A.), which will determine minimum wages.

(a) All wages shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount earned by each individual at the time of payment. There shall be no deductions on account of goods purchased, rent, or other obligations. Such obligations shall be subject to collection only by legal process.

Any violation of rule 3 (a) may be notified by the Administrator, or by the agency of the United States executing the contract, to the district attorney of the ap-

468 propriate district who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(4) The contractor under any construction contract entered into by the Administrator, or by any agency of the

United States, financed by funds appropriated under the National Industrial Recovery Act, shall post in a prominent and easily accessible place at the site of the work a clearly legible statement of all wage rates to be paid the several classes of labor employed on the work.

Any violation of this rule may be notified by the Administrator, or by the agency of the United States executing the contract, to the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

(5) If it shall be found by the Administrator, or by the agency of the United States executing the contract, that any laborer or mechanic employed by the contractor or any subcontractor under any contract financed in whole or in part by funds appropriated under the authority of the National Industrial Recovery Act, has been or is being paid less than is prescribed in the contract, the Administrator, or the agency of the United States executing the contract, shall notify such contractor or subcontractor to pay such laborer or mechanic all wages due him according to the prescribed rate. Upon 10 days default on the part of such contractor or subcontractor, the Administrator, or the agency of the United States executing the contract, shall notify the district attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for the violation of this rule.

Sec. 4. *Construction contract provisions.*—(1) There shall be no requirement in any construction contract providing price differentiations for or restricting the use of
469 materials to those produced within the Nation or State, provided, however, that preference shall be given to the use of materials produced under codes of fair competition approved under title I of the National Industrial Recovery Act, if prices, quality, and quantities available are satisfactory to the Administrator or to the agency of the United States executing the contract.

Note 1.—The above provision, insofar as it prohibits restriction of materials to those produced within the Nation, does not apply to Federal contracts.

Note 2.—To the extent that it is feasible and practicable and does not involve higher costs, inferior quality, or insufficient quantity, it is the policy of the Administrator that local materials should be used.

(2) All construction contracts shall provide that the Administrator, through his authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and other data relevant to the performance of the contract.

(3) Every person who performs the work of a laborer or of a mechanic on a project financed in whole or in part by funds appropriated under the act shall be entitled to the benefits of the labor and wage provisions thereof, regardless of any contractual relationship between the contractor or subcontractor and such laborer or mechanic.

(4) All construction contracts and subcontracts shall prescribe minimum wage rates as determined by the agency of the United States executing the contract, which contractors shall pay to classes of skilled and unskilled labor. Such minimum rates shall be stated also in the advertisements for bids and in all proposals of bids submitted, including those of subcontractors.

(5) Preference in the order stated in sec. 206 (4) shall be given to ex-service men with dependents where qualified.

The contractor will be furnished with lists of such
470 ex-service men from the United States Employment service.

Note.—Instructions will be issued stating procedure in case of dispute as to the application of this provision in connection with section 1 (5) of this article.

(6) To the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be preferred. The State engineer (P.W.A.) will make this determination before advertisement.

Sec. 5. *Bidding not to be confined to local contractors.*—Bidding shall be open to all qualified contractors. The State engineer (P.W.A.) will determine what contractors are qualified, pursuant to instructions to be furnished by the Administrator.

Sec. 6. Tests for eligibility or projects.

The Administrator, the State advisory board and the State engineer (P.W.A.) will apply the following tests in determining the eligibility of each project submitted:

(1) The relation of the particular project to coordinated planning, and its social desirability.

Note.—No project will be considered which is a mere makeshift to supply work. No non-Federal project will be considered which will require for its maintenance or operation an additional outlay by the Federal Government.

The Administrator and the State board will consider ascertained trends as to changes in population, industries, and other social and economic factors. (See art. III, sec. 2.)

(2) Economic desirability of the project; i.e., its relation to unemployment and revival of industry.

(3) The soundness of the project from an engineering and technical standpoint.

(4) The financial ability of the applicant to complete the work and to reasonably secure any loans made
471 by the United States.

(5) The legal enforceability of the securities to be purchased by the United States or of any lease to be entered into between the applicant and the United States.

Sec. 7. *Preferences.*—(1) Projects integrated with and consistent with a State plan are to be preferred to the isolated or inconsistent. (2) Projects which can be started promptly are to be preferred to those requiring delay. (3) Projects near centers of unemployment are to be preferred.

Sec. 8. *Tests for the grant to public bodies.*—The President is empowered to make grants, to States, municipalities, or other public bodies, for the construction, repair, or improvement of any project approved by him, not in excess of 30 percent of the cost of the labor and materials employed upon such project. The terms are to be such as the President shall prescribe.

The President has prescribed and the Administrator will apply the following test to enable him to determine whether to make the grant, and if so, to what extent: The social and economic significance of the project and its relative importance in the comprehensive national program of public works contemplated by the act, and the extent its construc-

tion will provide employment and purchasing power in the vicinity.

The following classes of projects will be preferred as to the grant: (1) Waterworks projects not unduly burdening the community with debt and necessary for its health and convenience; (2) sewer projects of the same character; (3) sewage-disposal projects sufficiently comprehensive to render a river or lake system, used by many communities, safe as a water supply, and other sewage-disposal projects; (4) other projects, which, like the foregoing, are regenerative, i.e., tend to stimulate further projects, such as highways, bridges, and tunnels, opening of new territory for homes and industry, projects for the transmission of
472 electrical energy into territories not now served.

The President, in determining whether to allow or withhold the grant, will also consider to what extent the budget of the applicant is balanced or in process of balancing and will prefer those public bodies which put their finances in order.

The grant will not be allowed unless the public body either (a) has power to sell to the United States its bonds in sufficient amount to reimburse the United States for its outlay (less the grant if allowed) in connection with the project and enters into a contract so to do and to complete the project, or (b) has power to convey the site of the project to the United States and contracts so to do, and to pay rental sufficient to reimburse the United States for its outlay less the grant if allowed, and to complete the project, or (c) is in process of securing the necessary powers and the Administrator is convinced that such powers will be obtained, or (d) in special cases as the President may determine.

Sec. 9. *Price of bonds and interest rate of public bodies.*—The United States will bid par and accrued interest, for bonds to finance projects of public bodies, approved by the Administrator, provided all bonds bear interest at the rate of 4 per cent or more. In the event such bonds bear interest at the rate of more than 4 percent the difference between 4 percent and the coupon rate will be refunded by the United States from time to time during the period while such bonds remain in the posession of the United States.

Sec. 10. *Amortization.*—Bonds and obligations under contract of lease are to be annually amortized pursuant to State statutes and according to the life of the project not to exceed 30 years except in the case of such projects as obviously have a longer life and in no case to exceed 50 years.

Sec. 11. The contract between the United States
473 and the applicant (public bodies and others) for benefits under the act.

When the applicant shall have furnished information and evidence sufficient to assure the fulfillment of the legal, financial, engineering, and social requirements of the act, and the project has been approved as to eligibility and terms, a contract will be drawn embodying such approved terms and if agreed to, will be executed by the Administrator and the applicant. The contract will state all the terms, including the wage and labor conditions, and will provide for supervision by the Administrator to a degree sufficient to insure compliance with the construction and other terms thereof.

Sec. 12. There shall be created a Labor Board of Review which shall hear all issues arising under the operation of these contracts and such problems as may result from fundamental changes in economic conditions during the life of these contracts. The Board of Review to be created shall consist of one representative of labor, one representative of the contractors, and a chairman representing the Administration. The decisions of this Board of Review shall be binding upon all parties.

Article III. Duties, Functions, and Organization of the Emergency Administration

Section 1. The act (title II) requires the performance of three functions: (1) The formulation of the comprehensive plan. This involves the application of the factors described above (Art. II, sec. 6, p. 7) to determine the eligibility of any project for inclusion in the plan. It involves also the ascertainment of the facts as to the feasibility of the project from an engineering, financial and legal standpoint. (2) The negotiation and drafting of a contract between the United States and the applicant when the project has been approved by the Administrator. (3)

The supervision and policing by the Administrator of the performance of the contract.

474 In order to effectually and promptly perform these functions, the administration is organized decentrally with centralized control.

Sec. 2. The central organization (a) The Planning Board. Its functions are (1) To advise and assist the Administrator in the preparation of the "Comprehensive program of public works" required by the Recovery Act, through—

1. The preparation, development, and maintenance of comprehensive and coordinated plans for regional areas in cooperation with national, regional, State and local agencies; based upon

2. Surveys and research concerning (a) The distribution and trends of population, land uses, industry, housing and natural resources; and (b) the social and economic habits, trends and values involved in development projects and plans; and through

3. The analysis of projects for coordination in location and sequence in order to prevent duplication or wasteful overlaps and to obtain the maximum amount of cooperation and correlation of effort among the departments, bureaus, and agencies of the Federal State, and local governments.

(b) The labor board. This board will advise and assist the Administrator as to the requirements of contracts insofar as they affect labor. This board will function in cooperation with the Department of Labor.

(c) The technical board of review. To be referred to this board are projects approved in principal by the Administrator but of an unusual character and/or involving difficult questions of engineering, finance, or law. To it also will be referred projects of a controversial character for the hearing of objectors.

(d) Units of central organization. Units are set up with appropriate technical personnel for the consideration of the following classes of projects: (1) Federal; (2) projects of public bodies (other than housing); (3) housing;

475 (4) private projects, i.e., those of public facilities operated by private corporations devoting their property to a public use (bridges, tunnels, docks, viaducts,

waterworks, canals, markets, hospitals, reservoirs, dry docks, and limited dividend corporations for the protection and development of forests and other renewable natural resources; (5) railroad maintenance and equipment for approval by the Interstate Commerce Commission.

(e) Serving the Administration as a whole, legal and financial units are set up.

Sec. 3. *Travel allowances.*—Allowances for authorized travel by the various classes of officers and employees of the Federal Emergency Administration of Public Works will be computed as prescribed by existing laws applicable to such classes, but shall be paid from the funds made available by the provisions of the National Industrial Recovery Act.

Sec. 4. *Control and method of meeting expenses of technical field forces by the central administration.*—The central office will appoint and direct a State engineer, who will advise with the State advisory board. The central office will utilize and direct the disbursing officers of the Treasury in the disbursement of Federal funds for the payment of allowances and expenses of the State advisory boards and the regional advisers.

Sec. 5. *Method of providing funds to finance approved projects.*—The central office will utilize banks of the Federal Reserve System as depositaries of securities purchased by the Administrator and as fiscal agents for the disbursement of Federal funds to finance the construction of approved projects. This matter will be covered by bond-purchase contracts to be executed by the applicant and the Administrator.

Sec. 6. The central office will receive projects forwarded by the State boards by the Reconstruction Finance Corporation, the Federal departments and independent
476 offices, and will consider them in accordance with the policy declarations described in Article II. It will submit through the Administrator to the President for his approval all projects deemed eligible for the benefits of the act and for the determination of the grant (if the projects are those of public bodies) and of other terms. This submission will be in the form of a recommendation supported by a brief summary showing the nature of the project, the name of the applicant, its estimated cost, its

social desirability, to what extent its construction will provide employment and such other supporting information as may be appropriate.

The central office, through the appropriate State advisory board, will elicit from the applicant such additional information and data (if any is necessary) as will make possible the drafting of a contract embodying the necessary terms and conditions, and will agree with the applicant on such terms. Upon the execution of such contract the central office will forward a copy thereof to the appropriate State engineer with other information to enable him to supervise and police the execution of the contract. The central office will also arrange for the disbursement, pursuant to the contract, of Federal funds to the applicant for the financing of construction.

Sec. 7. *Registration and promulation of comprehensive program.*—The Administrator will designate an officer whose duty it will be to register the comprehensive program as projects, Federal and non-Federal, are from time to time approved by the President, or by the Administrator under his direction. It will be the duty of such officer to attest the inclusion of such projects and from time to time cause to be printed a list of projects so included and attested for the information of the Federal departments, public bodies, and others as may be appropriate.

Article IV. The State Advisory Boards and State Engineer
(P.W.A.)

477 Section 1. *Functions of State advisory boards.*—(a) To stimulate the submission of projects, (b) to inform the public of the classes of projects eligible for the benefits of the act, (c) to elicit from applicants the supporting data (social, engineering, legal and financial), necessary for the consideration of the project, (d) to consider the project from the standpoint of local coordinated planning, social and economic desirability, provision of employment, diversification of employment, engineering soundness and otherwise in accordance with the policies set out in article II, (e) promptly to submit to the Administrator with its recommendations all projects considered.

Sec. 2. *Duties of State engineers* (P.W.A.).—(a) General duties. The engineer will be appointed and directed by the

administrator and responsible to him. The engineer will be the executive officer of the board, will organize its office and employ and direct its personnel, receive, record, and examine all applications and report to the board on each from the standpoints stated in section 1 (d) of this article.

(b) Procedure as to applications. When an application (in four counterparts) is received and recorded the engineer will examine it to ascertain whether it includes all necessary engineering, financial, legal, and other information, and will elicit from the applicant further information if needed. When all needed information has been supplied the application will be listed for final examination according to the priorities stated in article II, section 7. Upon completion of examination the engineer will submit the application to the board and the board to the Administrator with its recommendation.

Sec. 3. *Organization of State advisory boards.*—Compensation to each member will be $10 per diem, subsistence at $5 per diem, and reimbursement for expenses other than subsistence (as allowed by Government travel regu-
478 lations). They are authorised to employ such clerical assistance as is necessary and approved by the Administrator. Each board is authorized to employ, on a per diem basis not exceeding $15 per diem (expenses as above), such legal, financial, publicity, and other personnel *as may be approved by the Administrator,* to enable it to perform its functions.

Sec. 4. *The immediate program.*—Each State advisory board promptly will apply itself to the formulation and submission to the Administrator of an immediate State program of public works. In some States official agencies have approved programs of projects. The board will obtain such programs, examine the projects thereon as to conformity with the policies set out above and expedite the submission to the Administrator of such as conform.

In those States where no officially approved program exists the board will proceed to formulate an immediate program of its own. To that end it will call meetings of such State, municipal, and other officers, persons, and agencies as it deems qualified in the premises.

The immediate program shall include only such projects as (1) can be started within 30 days; (2) are safe and

sufficient from an engineering standpoint; (3) are necessary and convenient from a social standpoint; (4) the applicant has a balanced budget, is in process of balancing it, or action toward such balancing is in good faith assured.

To the extent such projects are before it, the Board and the State engineer will give priority in the following order: (1) Waterworks and sewage projects; (2) sewage-disposal projects sufficiently comprehensive to render river or lake systems safe as water supply for large masses of the population, and other sewage-disposal projects; (3) other regenerative projects as defined in article II, section 8; (4) other projects that are socially necessary and economically sound.

The Board will not hold for the completion of the
479 immediated program projects satisfying the above tests and priorities, but will submit each project considered by it to the Administrator (after obtaining the fulfillment of engineering, financial, and legal requirements). Forms of reports and recommendations will be furnished the State engineers. (P.W.A.)

Article V. Method of Financing Projects of Public Bodies.

Section 1. A project of a public body approved by the Administrator will be financed on the basis of either (a) purchase of the bonds or other obligations of the public body issued to finance the project, or (b) lease, in that event the United States acquiring and holding title to the property until paid for its outlay (less the grant, if made) through rental or payment of purchase price.

Sec. 2. In the case of purchase of bonds, the United States will bid on the bonds of a public body to finance a project approved by the Administrator. The United States will bid par and accrued interest, provided the bonds bear 4 percent interest, and will be amortized as provided above.

Note.—The terms of the bond purchase, including the application of the grant if allowed, will be covered by a contract to be drawn by the central office after agreement with the applicant.

(a) *Non-revenue-producing projects.*—The usual method of financing such projects is by the sale of general obligation bonds. Most public bodies now have statutory au-

thority to issue this type of security. When available this method should be adopted.

(b) *Revenue-producing projects.*—Some States authorize public bodies to issue bonds with debt service limited to the earnings of the utility (waterworks, electric-light plants, etc.). The courts in some of those States have decided that such bonds are not debts within constitutional or
480 statutory limitations. In other States the courts hold that such bonds constitute debt if issued for extensions to an existing utility and are made payable out of current revenue, as distinguished from new revenue to be earned through the extension. Applicants will ascertain and state the law on these points in connection with their applications.

* * * * * * * * *

Sec. 7. *Policing of construction contracts.*—(a) The administrator will supervise and police the performance of contracts, including the labor and wage provisions.

Sec. 8. (a) *Construction contract bonds.*—The Administrator will require the adequate bonding of construction contracts. Instructions in this regard, including provision for bonding, to protect labor and material men, will be supplied.

Article VI. Regional Advisers

Section 1. *Functions.*—(a) To assist the planning board to formulate a plan for each region. In such formulation the regional adviser will consider State plans and apply, so far as applicable, the statement of functions of the planning board (art. III, sec. 2 (a), p. 9). The said board will advise and assist the regional adviser in the premises and he will accumulate and collate and submit to said board all available information useful to it.

The regional adviser will endeavor to stimulate, by publicity and otherwise, so far as may be within his power, public interest in regional and general planning.

Sec. 2. Each regional adviser will obtain from the State advisory board of his region lists of projects under consideration by them and a copy of their recommendations and rejections. Each regional adviser will from time to time visit the offices of the State advisory boards in his region and will advise and consult with them to the end

that their action may be consistent with sound regional planning.

481 The plaintiffs next prepared to offer a series of documents and plaintiffs' counsel made this statement:

"That this documentary evidence is intended to support the allegations of the bills, to the effect that the loans and grants in these cases are being made pursuant to, and as a part of, a policy or program, a national power policy or program, of which the PWA activity in these phases is an integral part, for the purpose of regulating intrastate rates, promoting public ownership, and otherwise interfering with what we believe to be the reserved rights of the States.

And we offer that as applicable to both of our contentions: The first one being that the National Industrial Recovery Act, properly construed, does not authorize the Administrator to make loans and grants of Federal funds for the purpose of regulating intrastate rates, promoting public ownership, or regulating rates of labor and hours and conditions of labor on intrastate projects; and, second, that if it be construed to grant that power to the Administrator, it is to that extent unconstitutional and void."

The plaintiffs marked for identification as Plaintiffs' Exhibit No. 123 a book entitled "Back to Work, the Story of PWA" by Harold L. Ickes, Secretary of the Interior and Administrator of Public Works, published by the MacMillan Company in New York in June, 1935, the copyright of which is held by Harold L. Ickes. There was no question that the copy so marked was an authentic copy and that the book was written by the said Harold L. Ickes.

The plaintiffs then offered in evidence, as admissions of the defendant Ickes, and exhibited to the Court, the material beginning with the last paragraph on page 21 through page 22, the paragraph at the bottom of page 46 and ending on the top of page 47, and all of Chapter VI entitled "Cheap Power". Plaintiffs' Exhibit 123 for identification is the same document as Defendants' Ex-

482 hibit 12 and the portions here indicated will be found *infra* in the said Defendants' Exhibit.

The plaintiffs offered the statements of the Administrator to show that his administration of the statute consti-

tuted a scheme and plan to foster public ownership
483 of electricity utilities and to bring about a lowering of electricity rates by the threat of federally subsidized competition and by the consummation of such competition. Plaintiffs' counsel stated: The offer is made to show, not a state of mind, but, as alleged in the bills of complaint, what the Administrator actually did, and to show that he was not spending federal funds in accordance with the stated purposes of the statute but with other purposes. The evidence offered, along with other evidence in the case or to be offered, will show that the defendants promulgated and carried out a national power program to drive down intrastate electricity rates where they were deemed to be too high and to promote a theory of public versus private ownership of local electricity utilities. If the Administrator had issued written rules and regulations to this end those rules and regulations would be admissible. The evidence offered is just as admissible. In the preface to his book the Administrator writes that he is rendering a "general accounting of what PWA has done and been during the almost two years of its existence".

The statute directs the formulation of a comprehensive program of public works. The evidence offered shows what that program was insofar as it relates to electricity projects.

If the statute is construed to authorize the Administrator to construct projects at strategic places for the purpose of bringing down intrastate electricity rates then the statute would be unconstitutional. The evidence offered shows that that is what the Administrator did.

The statements made by the Administrator in this book are admissible; the plaintiffs are not limited to what the Administrator may say on the witness stand.

The defendants objected to the receipt in evidence of any portions of Plaintiffs' Exhibit 123 for identification on the following grounds:

484 The evidence is irrelevant. Manifestly it has no bearing on the constitutionality of the statute. As to the issue whether the Administrator is exceeding his statutory authority, a municipal power plant obviously comes within the terms of the statute and that is the end of the

matter. Any collateral objects which the Administrator may seek are irrelevant.

The evidence does not mention the specific projects in suit and is therefore irrelevant.

Whatever the Administrator says, whatever the effluvia of his motives, wishes, desires, or pronouncements may be, can have nothing to do with the central question whether these particular agreements are valid under the statute and whether that statute is constitutional. The reasons that the Administrator acted are irrelevant, if what he actually did came within the statute.

In any event statements appearing in a privately published book—not an official report—are not admissible.

After an extended argument along the lines indicated, which the Court invited as bearing upon issues to be raised by offers of evidence to be made subsequently and upon the merits of the case, the Court ruled:

"The Court. This is very interesting, and ultimately goes right to the meat of the controversy. What I have before me just at this moment is this book. I am going to sustain the objection. I think that we have to judge the acts of the Administrator by official pronouncements, and not by books. If that book were admissible, then a speech that was made could be introduced in evidence, or a private conversation would be admissible. I do not believe that that is the proper kind of evidence. The Administrator's acts have to be judged by what he did officially. That is my view of it, so I will have to sustain the objec-

485 tion."

Exceptions were allowed the plaintiffs.

Thereupon each paragraph of the foregoing excerpts from Exhibit 123 for identification was separately offered for the same purposes, separately objected to on the same grounds, the objections separately sustained and separate exceptions allowed the plaintiffs.

486 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #132 Press Release #44 of the Federal Emergency Administration of Public Works, dated August 8, as follows:

An allotment of $400,000 from public works funds to the Federal Power Commission was announced today by Public Works Administrator Harold L. Ickes.

The Power Commission, under the direction of President Roosevelt, will prepare a comprehensive national plan for the development of water power and the transmission of electricity, examine public works power projects referred to it by the Public Works Administration and make a study into the costs of the transmission of electricity from generating stations to consumers.

The allotment will enable the Commission to begin its investigations and studies at once.

The determination of facts with regard to the cost of transmitting and distributing electricity to consumers under varying conditions is of great importance not only in ascertainng the economic feasibility of power projects but also the distribution cost element properly to be included in rates to consumers of electricity.

Such an investigation was ordered by the Senate at the last session through a resolution introduced by Senator Costigan, of Colorado.

National planning of water power development, the Federal Power Commission advises the Public Works Administration, will effectuate the purposes of Congress, which in the Federal Water Power Act of 1920, authorized the commission to investigate "the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be
487 advantageously used by the United States for its public purposes, and what is fair value of such power, to the extent the Commission may deem necessary or useful for the purpose of this act."

The Federal Power Commission points out that up to the present time the development of the water power resources of the United States, both public and private, has been carried on without reference to any comprehensive or integrated national plan. As a result, there have been many instances in which the full economic and social value of the Nation's resources has not been secured. In other cases there has been a lack of proper coordination between projects developed in the same region. Power projects have also sometimes been developed without proper regard for the available market to consume the electricity gen-

rated. The failure to develop a national power program has therefore resulted in great economic loss.

It is planned to organize the work on a regional basis so that local projects under the Public Works Administration may receive prompt consideration. Making use of the trained personnel and facilities of the Power Commission will obviate the necessity of setting up a new organization for this purpose within the Public Works Administration.

In the preparation of the national plan the Federal Power Commission will cooperate with the Public Service Commissions of the several States, as well as with the Public Works Administration, the Tennessee Valley Authority and leading authorities of the electrical industry throughout the United States.

The Federal Power Commission is composed of Frank R. McNinch, of North Carolina, Chairman; Basil Manly, of the District of Columbia, Vice Chairman; Herbert J. Drane, of Florida; Claude J. Draper, of Wyoming, and George Otis Smith, of Maine. (P. W. 74444)

488 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit 133 the Executive Order of the President dated August 19, 1933, providing:

Pursuant to Title II of the National Industrial Recovery Act the President designates the Federal Power Commission as an agency to aid the Federal Emergency Administrator of Public Works in the preparation of that part of the comprehensive program of public works provided for in Section 202 of the Act which pertains to the development of water power and the transmission of electrical energy. As such agency the Commission shall make a survey of the water resources of the United States as they relate to the conservation, development, control and utilization of water power; of the relation of water power to other industries and to inter-state and foreign commerce; and of the transmission of electrical energy in the United States and its distribution to consumers, and on the basis of this survey shall formulate a program of public works. Upon the request of the Federal Emergency Administrator of Public Works the Commission will investigate applications for loans to be made under Title II of the National Industrial Recovery Act for the construction of public works projects which involve the development of and the

utilization of electric power and will make recommenda-
(No Sheet 489)
tions with respect thereto to the Administrator.

490 The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #134 Press Release #201 of the Federal Emergency Administration of Public Works dated October 15, 1933, which was a resume of PWA activities for the preceding three months. The resume notes among other things:

Since July 8, when the President appointed Secretary of the Interior, Harold L. Ickes, Administrator of Public Works, the PWA offices in Washington and every State have been bending every energy to get idle men back to work.

Machinery was perfected early for the speedy handling of thousands of applications for loans with due regard to the taxpayers' interest.

And today, 99 days after the Administrator took office, the PWA has made allotments amounting to more than $1,709,000,000, covering over 7,000 Federal and non-Federal projects. In this brief space of time hundreds of thousands of persons have been put to work, directly and indirectly. This number will increase steadily as hundreds
of projects, already authorized by the Administra-
491 tor and Special Board for Public Works, move into actual construction as soon as legal requirements are met as to the advertisement of bids and letting of contracts.

Difficulties which the PWA had to meet in its infancy were almost insurmountable. Congress had ordered a revolutionary change in the old method of authorizing public works in the United States. Naturally there were many different schools of thought as to how the Act should be administered.

One of Administrator Ickes' first recommendations to the President called for a decentralized PWA, with regional advisers in ten regions of the country and State Advisory Boards and State Engineers representing the Washington office in each State. Control of the money was to remain in Washington, however. This was done.

Despite the many details incident to the creation of such a vast organization no time was lost in authorizing allot-

ments from the $3,300,000,000 fund. The Special Board on July 18 announced allotments amounting to approximately $65,000,000 for work to be done under the direction of Federal Departments.

The first of the big allotments were made. Among them were $63,000,000 for the Grand Coulee Dam on the Columbia River, $22,700,000 for the Casper-Alcova project in Wyoming and $11,500,000 for work on the Upper Mississippi River.

An important announcement was made on August 8, concerning an allotment of $400,000 to the Federal Power Commission to survey comprehensively the country in a National plan for development of power and to ascertain costs of the transmission of electricity from generating stations to consumers.

Two gigantic projects for New York City were approved during the month—the $44,200,000 Triborough Bridge and the $37,500,000 Hudson Tunnel connecting Manhattan with Weehawken, New Jersey.

September marked the beginning of another phase
492 of activity. Applications from public bodies began to arrive in larger numbers from State Advisory Boards. To spur cities to even greater activity Colonel H. M. Waite, the Deputy Administrator, held regional meetings throughout the country, covering a 6,500 mile itinerary by airplane in nine days.

An important unit in the PWA is the Housing Division charged with passing on applications for low-cost housing and slum-clearance. At the end of the three-month period low-cost housing projects had been authorized in the amount of $40,427,458.

When destructive storms swept the Eastern seaboard in August the PWA made allotments to the Navy, Army and Coast Guard so that repairs could be made to damaged Government properties at once without awaiting the convening of Congress in January to authorize appropriations.

The PWA also has set up three boards to consider all plans and projects for the future development of the Mississippi River and its tributaries, the Red River and the Arkansas River Basin. Several hearings already have been held by the Mississippi Drainage Area Board.

Large allotments have been made to the Army for flood control and rivers and harbors work in all parts of the country, to the Navy, Interior and Agriculture Departments and in fact to virtually every branch of the Federal establishment. As a result, men, long idle, are working in shipyards, on the rivers and in the forests.

About 50,000 men are at work on the Nation's highways and this number is mounting daily.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #135 Press Release #701 of the Federal Emergency Administration of Public Works which notes that the Administrator had announced an allotment of $300,000. to the Federal Power Com-
493 mission to carry on an investigation with respect to rates charged for electrical energy. The investigation was ordered by the President under the authority of Senate Joint Resolution approved on April 14, 1934. The allotment is an addition to the prior allotment of $400,000. made to the Commission by PWA.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #136 Press Release #1396 of the Federal Emergency Administration of Public Works which notes that the Administrator had announced an allotment of $125,000. to the Federal Power Commission to continue the electric rate survey and the national power survey. This allotment will be used for an analysis of an investigation of rates paid for electricity by federal agencies, for a special field investigation of power requirements and resources in the area that may be served by the Tennessee Valley Authority, and for the completion of publication of studies in the course of preparation by the Commission. The studies include rural electrification, the cost of the distribution of electricity and economies of inter-connection and coordination.

The tabulation and analysis of rates was requested by the Procurement Division of the Treasury Department, to be used in connection with negotiations for light and power contracts for the next fiscal year. The field investigation in the TVA area will be of use to TVA.

The original investigations by the Federal Power Commission, financed by a PWA allotment, were authorized by the Senate and by executive order.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #137 'Press Release #1733 of the Federal Emergency Administration of Public Works which notes that an additional allotment of $250,000. to the Federal Power Commission to continue investigations
494 and studies authorized by executive order in accordance with a Senate Joint Resolution was announced by the Administrator. The money is to be used for the collection of data concerning the present cost of generation, transmission and distribution of electrical energy and concerning the control and utilization of national water resources, including location, capacity, development costs and relation of power sites to markets; also concerning the relation of the hydro-electric industry to other industries and to inter-state and foreign commerce. The money is also to be used for the continuance of the investigation regarding rates charged for electricity and for the preparation of a report to the Senate.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #138 a document numbered P. W. 18366 reading as follows:

"President's Letter Creating the National Power Policy Committee

Establishment by the President in the Public Works Administration of a Committee called the 'National Power Policy Committee' was announced today at the White House. (July 16, 1934).

495 Secretary Ickes will be Chairman of this Committee, the membership of which will be composed of:

Dr. Elwood Mead, of the Bureau of Reclamation,

Honorable Frank R. McNinch, of the Federal Power Commission,

Honorable Morris L. Cooke, of the Mississippi Valley Committee, PWA,

Major General Edward M. Markham, Chief of Engineers, War Department,

Honorable Robert E. Healy, of the Federal Stock Exchange Commission,

Honorable David E. Lilienthal, of the Tennessee Valley Authority,

Honorable T. W. Norcross, Assistant Forester of the Forest Service.

In the following letter from the President to Secretary Ickes under date of July ninth the purpose and duties of this committee are outlined:

'I wish to establish in the Public Works Administration a Committee to be called the "National Power Policy Committee" Its duty will be to develop a plan for the closer cooperation of the several factors in our electrical power supply—both public and private—whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and, particularly, to agricultural consumers.

'Several agencies of the government, such as the Federal Power and Trade Commissions, have in process surveys and reports useful in this connection. The Mississippi Valley Committee of Public Works is making studies of the feasibility of power in connection with water storage, flood control and navigation projects. The War Department and Bureau of Reclamation have under construction great hydro-electric plants. Representatives of these agencies have been asked to serve on the committee. It is not to be merely a fact-finding body, but rather one for the development and unification of national power policy.

'As time goes on there undoubtedly will be legislation on the subject of holding companies and for the regulation of electric current in interstate commerce. This committee should consider what lines should be followed in shaping up this legislation. Since a number of the States have commissions having jurisdiction over intrastate power matters, it is necessary that whatever plan is developed should have regard to the powers of these various State commissions as well as of the States in general.

'It is not thought that it will be necessary to have frequent meetings of the full Committee. An adequate administrative staff will be provided, and personal expenses of the members of the Committee in connection with its meetings will be met.

'The Committee is to be advisory to the President. I hope that you will accept membership on this Committee and act as its Chairman.' "

Counsel for the defendants agreed that the date of the President's letter given as July 9 should be understood to be July 9, 1934.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #139 Press Release #868 of the Federal Emergency Administration of Public Works, which states that the Administrator had announced an allotment of $100,000. to the newly appointed National Power Policy Committee for necessary expenses. The release also states that the Committee's duties will be
497 to develop a plan for the closer cooperation of several factors in electrical power supply, both public and private, whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and, particularly, to agricultural consumers.

Whereupon the following occurred:

Mr. Jackson. The plaintiffs now produce a document marked "P. W. 1073, Federal Emergency Administration of Public Works", addressed "To State Engineers", dated November 8, 1933, signed "H. M. Waite, Deputy Administrator", and offer it in evidence as Plaintiffs' Exhibit No. 140. (Federal Emergency Administration of Public Works, No. P. W. 1073, dated November 8, 1933, was thereupon marked Plaintiffs' Exhibit No. 140 for identification).

Mr. Holtzoff. We object to this as irrelevant and incompetent, and not binding on the defendants.

The Court. You mean that it was not signed by Mr. Waite?

Mr. Holtzoff. It is incompetent because it is not signed by any of the defendants; and it is irrelevant because it does not bear on any of the issues in this case or any of the projects.

The Court. I shall see what it is.

Mr. Jackson. I should like to read it. Shall I read it?

The Court. Yes. Well, I can read it myself, quicker than you can read it aloud.

Mr. Jackson. Yes. And I want to have it transcribed into the record. (Plaintiffs' Exhibit No. 140 for identification is herewith transcribed into this record as fol-
498 lows:)

'Federal Emergency Administration
Of Public Works

To State Engineers November 8, 1933

A number of inquiries have come in to me regarding our attitude and procedure to regard to applications for loans for municipal light plants. I have prepared the present letter to set forth my views.

It seems to me that we should do all in our power to prevent becoming embroiled in local political disputes. I think it is going a bit too far and creates an unnecessary amount of work to notify all the utility companies when a municipal utility application comes in. Isn't it a fact that when you hear one argument you hear all of them? In principle they are the same. After all, the question for you to decide is one of whether or not it is engineeringly, economically and socially sound.

The entire procedure of the utility company is one of delay. You find this everywhere. We are most anxious to set up around the country sound publicly owned utilities as yard-sticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates for electricity.

Where you do find it necessary to have a hearing, both sides, of course, should be present. I cannot see why it is necessary for the utilities to get into a three-cornered engineering discussion between the utilities, the applicant and ourselves. As far as the engineering is concerned I don't think it is any of the utilities business. Your engineering force, together with the engineering which has been done by the applicant and which will be checked
499 here, is sufficient.

If the utility desires to file a brief or be heard, and you decide it is necessary and advisable to do so, you can give them enough of the facts on which they can prepare their brief.

H. M. WAITE
Deputy Administrator

P. W. 1073'.

(Plaintiffs' Exhibit 140 for identification was examined by the Court.)

The Court: I shall sustain the objection; I think it is immaterial.

Mr. Jackson. May I inquire whether any objection is sustained on the ground that it is signed by Mr. Waite, as Deputy Administrator?

The Court. I think it is irrelevant.

Mr. Jackson. Sir?

The Court. I think it is irrelevant.

Mr. Jackson. I wish to have it appear in the record, because it is the only copy we have—so that we may show what it is; and we wish to note an exception to the ruling of the Court."

The plaintiffs offered an excerpt from a certain document; the offer was rejected on the grounds that a portion of a document was not admissible. Thereupon the following occurred:

"Mr. Jackson. And now, reserving our exceptions to the last two rulings of the Court, with reference to refusing to admit admissions appearing in Plaintiffs' Exhibit No. 141 for identification, I offer the entire document, and ask to have it transcribed in the record, from that document, if it admitted, the same material which I originally offered separately.

500 The Court. I think the whole thing is wholly immaterial,

Mr. Jackson. See what you are doing: You have probably been through thousands and thousands of pages of material that has been handed out by press agents; and wherever you could find a sentence that in some way reflected on the Administrator, you are now offering that in evidence. And I do not like it.

Mr. Jackson. I protest, your Honor, against the statement 'reflecting on the Administrator'.

The Court. But that is what it is. The very sentence following the one you introduced, or asked to be introduced in evidence, is rather complimentary to him. It does not purport to be written by him. You have selected something that you think is against him. You have a right to do that, but I am not going to admit it.

Mr. Jackson. Well, may I observe that it is written by Mr. Ickes, and it is put out by the Federal Emergency Administration of Public Works—issued to the public.

But I do not want to exhaust your patience, in offering this; but I do want to make our record upon it.

The Court. All right; go ahead.

Mr. Jackson. Now, may I find out what the state of the record is on this particular point, Mr. Reporter?

The Court. You offered the whole thing, and I understand that it has been excluded.

(Several excerpts from the record were thereupon read by the Reporter.)

Mr. Holtzoff. Well, we object to it.

The Court. Very well; I shall sustain the objection.

Mr. Jackson. Let us have, now, an exception to the ruling of your Honor upon this."

The document offered and exhibited to the Court
501 was a copy of an article written by Public Works Administrator Harold L. Ickes, as released for publication by the Federal Emergency Administration of Public Works on November 15, 1934. The article appeared in the magazine Today, in the issue of November 17, 1934. The article was offered in evidence by the plaintiffs because of the following paragraph contained therein:

"This is not the place for a detailed discussion of the power policy of Public Works. But that policy also conforms to the general purpose to strengthen private enterprise. There is nothing, with the possible exception of a comprehensive housing program, that holds more promise for the future of industry in this country than the development and utilization of cheap power. Great natural water-power sites are being developed for the benefit of the communities they serve. Private companies serving these communities will, where sufficient power is developed have an opportunity to purchase this cheap power if they are willing to share its benefit with their consumers. Loans for municipal power plants have been granted only upon application of the municipality concerned and upon a clear showing that the existing rates can be substantially reduced after adequate provision for interest and amortization. Private companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA."

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #142 Press Release #709 of the Federal Emergency Administration of Public Works, which states:

"A Public Works Administration Electric Power
502 Board of Review has been estab' shed Public Works Administrator Harold L. Ickes today announced.

"This board will be composed of Henry T. Hunt, General Counsel of PWA, Morris L. Cooke, Chairman of the Mississippi Valley Committee, and Otto M. Rau, Counselor for the Administrator. Mr. Cooke is a Pennsylvania authority on power development and Mr. Rau is a qualified expert on utilities costs and operations.

"It will be the duty of this board to review disapprovals and special conditions imposed by any division of PWA and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair, improvement or extension of electrical power plant facilities.

"Because of the wide variety of conditions under which such applications are made the controversial nature of certain of the projects and the important economic factors involved in the general questions of power development, Administrator Ickes has decided such projects should receive the attention of the new review board comprised of men who have made detailed studies of the issues involved and who are fully informed on various developments in this field.

"The Administrator ordered the Technical Board of Review and the Projects Division of PWA to refer such applications to the Electric Power Board of Review.

"The Administrator directed the power board to formulate and submit instructions for the guidance of various PWA divisions with regard to controversial questions affecting this class of projects so that uniform policies and handling of these questions might be evolved."

The plaintiffs offered in evidence Press Release #468 of
the Federal Emergency Administration of Public
503 Works dated February 4, 1934, marked Plaintiffs' Exhibit 143 for identification, which contains quotations from an article by Administrator Ickes in the current

issue of the magazine Survey Graphic, including the following:

"The Administrator discussed at some length the need to bring cheap electricity to the largest possible number of people.

'In comfort and convenience as well as efficiency, farm living is heavily penalized by lack of this Alladin's lamp. A water pump to make possible the kitchen sink and the bathroom that the citydweller takes for granted—electric lights, relief from household drudgery by electric washing machines, electric iron and mangle, mechanical refrigeration, electric churn, a continuous supply of hot water—these are only a few of the means to easier and more satisfactory living that electricity could bring to the farm home. And if Ireland, Bavaria, Alsace-Lorraine, Norway and Ontario can take cheap electric current to the farms, then the farmers of the United States can have these modern conveniences too. * * *

'At present rural electric rates are almost prohibitive. President Roosevelt is leading the effort not only to make cheap current more widely available, but to lower the cost of distribution and of electrical appliances. * * * If any such dream is to become a reality, it will be under governmental leadership and supervision, insuring a development planned and carried out with advantage to the consumer, rather than to the power companies, as the first objection.'"

After the press release and the above excerpt were exhibited to the Court, the following occurred:

The plaintiffs offered the item as an admission of the defendant Administrator. The defendants objected on the ground that the evidence was irrelevant. The objection was sustained and the plaintiffs took an exception.

504 The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #144 the following:

"P. W. 38777

Federal Emergency Administration of Public Works

July 31, 1935

Order No. 188

For the purpose of giving special attention to applications for publicly owned power plants there is hereby estab-

lished in the Public Works Administration a separate division to be known as the Power Division, with Mr. Clark Foreman as Director.

The Power Division shall have complete jurisdiction over all power projects from the time they are received in the State Director's offices until they are finally approved or disapproved.

Preference shall be given in all State offices to the study of power projects. The State Director shall see that all necessary information be gathered as quickly as possible. In the event that it appears impossible for the State office to deal with these matters in a reasonable length of time through lack of qualified personnel or other cause, he shall forward the application promptly to the Power Division in Washington.

All correspondence in the Washington office relating to power projects will be referred to the Power Division for handling and reply.

This order will be effective as of August 1, 1935.

505 Harold L. Ickes
Administrator.

(Administrative Order No. 76)"

The plaintiffs offered and there was received in evidence as plaintiffs' exhibit No. 146 the following:

"P. W. 39837.

Federal Emergency Administration of Public Works

August 15, 1935.

Administrative Order No. 76 (Supplement 2)

Subject: Power Projects.

1. Applications for publicly-owned gas and electric utility projects will be examined and forwarded to Washington within thirty days after receipt in the State Director's office. If for any reason this is not possible, the Central Office must be advised promptly.

2. All applications for publicly-owned gas and electric utility projects will be forwarded to the Central Office whether approved or disapproved (see procedure outlined in Administrative Order No. 75 for handling applications).

3. The Projects Division will furnish a report to the Director of the Power Division on Saturday of each week on the status of all publicly-owned power projects that have not been forwarded to the Power Division by the field offices.

Horatio B. Hackett,
Assistant Administrator

Adm., Distribution: General."

506 The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #147 Office Order #43 of the Federal Emergency Administration of Public Works dated August 15, 1935, and signed by Horatio B. Hackett, Assistant Administrator. The order provided that all applications for publicly owned gas and electricity facilities which have been approved by the President but which have been held up in Washington for any cause should be referred immediately to the Director of the Power Division. It was also provided that applications which have been disapproved by any of the examining divisions but regarding which the applicants have not yet been notified should be referred to the Director of the Power Division, that all new applications should be sent directly to the Power Division, and that all correspondence concerning power projects in which any technical or controversial question is involved should be approved and signed by the Director of the Power Division.

The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #148 a supplement to Office Order #43 also signed by Horatio B. Hackett, dated August 23, 1935, providing that "all dockets under study or in suspension shall be delivered to the Power Division not later than September first, 1935. If the study can be completed by that time the regular report shall accompany the docket. If it is impossible to finish the study by September first, a memorandum should accompany the docket giving the Power Division the status of the examination."

The plaintiffs offered and there was received in evidence as plaintiffs' exhibit #150 Letter of Instruction #32 of the Federal Emergency Administration of Public Works dated December 4, 1935, and signed by Horatio B. Hackett,

Assistant Administrator. The letter directed that,
507 in order to give the Power Division a record of all power applications in the field, each state director should send to Washington at once one of the dockets whether or not examination was completed.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #152 Administrative Order #109 of the Federal Emergency Administration of Public Works dated December 19, 1935 and signed by Harold L. Ickes, Administrator. The order provides, among other things, that the Power Division of PWA shall have jurisdiction and control of all non-federal applications for loans and grants and all non-federal projects having to do with the construction, repair, extension and improvement of electricity and gas generating, supply and distributing systems. It is also provided that if there is a lack of personnel in any of the state directors' offices adequate to the examination of any such application, or when a state director is so instructed by a director of the Power Division, then the state director shall transmit to the Washington office the appropriate application documents without a prior examination and report. State directors are also instructed to give preference to applications under the jurisdiction of the Power Division. Each such application shall be transmitted to the Washington office within 30 days from the date of its receipt in the state director's office, whether or not the state director's examinations and reports have been completed. Correspondence, drafting of government offers, action upon requisitions and upon proposed change orders involving additional work or materials, when pertaining to electricity or gas projects, shall be handled by the Power Division.

The plaintiffs introduced and there were received in evi-
dence as plaintiffs' exhibits #153a, 153b and 153c
508 the forewords of the Government Manual for the years 1934, 1935 and 1936, which point out that the Manual is published by the National Emergency Council to give to the public an outline of the functions and organizations of various federal agencies. The factual information therein has been authenticated and approved by the heads of the respective departments and agencies and their chief counsel.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #154 pages 449 and 450 of the United States Government Manual, dated September 24, 1935, stating, among other things, that the Federal Emergency Administration of Public Works was established under Title II of the National Industrial Recovery Act, was extended until June 30, 1937 by the Emergency Relief Appropriaion Act of 1935, and by Executive Order 7064 was authorized to continue functions under Title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935. The Administration has as its chief aim the reduction of unemployment and the restoration of purchasing power through the construction of useful public works and encouragement of long range planning of public works. In each state there is a state director representing PWA. The decentralized organization with centralized control in Washington serves to promote public works throughout the country in connection with allotments of loans and grants to public bodies and to certain private corporations. The basis for allotments has been social benefit, economic feasibility and financial, legal and engineering soundness. "Before a project is finally approved for an allotment it must be found socially desirable and sound from legal, financial and engineering standpoints." Interest at 3% a year is charged on loans to public bodies. The Power Division of PWA is maintained "to give special consideration to applications for publicly owned power plants. State offices also are instructed to give preference to the study of such power projects."

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The plaintiffs introduced and there were received in evidence as plaintiffs' exhibits 155a, 155b and 155c pages 365 to 370 of the United States Government Manual for 1936. The exhibits make the same statements as those contained in plaintiffs' exhibit #154, and also contain the following, among other things:

Any public body meeting the requirements of PWA is entitled to borrow. These bodies include states, municipalities, school districts, drainage districts and others. Grants of money are also made to public bodies, not exceeding 45% of the cost of the project. "The public grants are given to induce public bodies to undertake construction of useful works. The grant is made in consideration of the agree-

ment by the applicant to apply in the construction of the project the requirements of the Public Works Administration, including the 30 hour week, veterans' preference, and just and reasonable wages as determined by the Special Board for Public Works." Large sums are advanced to public bodies for construction or repair of water works, sewer systems, electric light plants, streets and highways, bridges, schools, hospitals and regional facilities. The Administration prefers projects upon which work can be started quickly and completed within a year. These should also meet all the aims embraced by the Administration's purposes. Classes of projects preferred for grants are "water works projects not unduly burdening the community with debt and necessary for their health and convenience," "sewer projects of the same character", sewage disposal projects, "municipal power plants", other projects such as highways "and projects for the transmission of electrical energy", public schools and hospitals. There are also included statements of policy as to the 30 hour week,
the adoption of wage rates subject to the approval
510 of PWA state directors, weekly payments of wages,
investigations of irregularities and violations of law or regulations conducted by special agents of PWA, registering of complaints, etc. The Manual is signed by Harold L. Ickes, Administrator, and Henry T. Hunt, General Counsel.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #156 Press Release #1522 of the Federal Emergency Administration of Public Works. The release states that the Administrator had created the Power Division within the PWA for the purpose of giving special and expeditious attention to applications for publicly owned power plants and that preference would be given in all PWA state offices to the study of power projects. The Power Division will have jurisdiction over all power projects from the time they are received in the PWA state director's office until they are finally approved or disapproved.

The plaintiffs introduced and there were received in evidence as plaintiffs' exhibits #157 and 158 Press Release #1177 of the Federal Emergency Administration of Public Works dated January 13, 1935, and a pamphlet compiled

by PWA entitled "Municipally Owned Electric Utilities In the United States, 1934". The press release notes the publication of the pamphlet compiled by Mr. Otto M. Rau at PWA and summarizes the information given therein. This information consists of a map of the United States showing the location of all municipally owned electricity systems, the population of places served by municipal plants, the type and capacity of municipal plants, the location of municipal plants which compete with privately owned electricity systems, and other information relating to the extent of municipal ownership and the capacity and size of municipal plants.

The plaintiffs introduced and there was received
511 in evidence as plaintiffs' exhibit #159 page 173 of the United States Government Manual for 1936, which states that the National Power Policy Commitee was organized under authority of a letter from the President to the Secretary of the Interior dated July 9, 1934, that its purpose is "to plan for the closer cooperation of the several factors involved in the electric power supply of the United States, both public and private, whereby national policy in power matters may be unified and electricity made more broadly available at cheaper rates to industry, to domestic and to agricultural consumers." The Committee acts in a capacity advisory to the President. It is composed of officials of various federal government units. It has the cooperation of the Federal Power Commission and the Federal Trade Commission as well as other federal agencies. This information appears over the name of "Harold L. Ickes, Chairman."

The plaintiffs offered and there was received in evidence plaintiffs' exhibit #161, Press Release #248 of the Federal Emergency Administration of Public Works, dated October 30, 1933. The press release contains the following statements:

* * * * *

A survey of non-Federal allotments of PWA announced today revealed just what the taxpayers are getting for their money and how the map of the Nation is being dotted with works which have been qualified as "socially beneficial" in that they make the citizens' day-to-day life easier, more safe and comfortable.

More waterworks have received allotments than any other type of non-Federal projects with sewers coming next on the list.

The survey by types of 448 projects and amounts allotted showed:

Character of Project	*Number*	*Total Allotment*
Waterworks	100	$29,004,160
Sewers	91	41,805,195
512 Streets and highways	80	20,144,602
Housing	17	46,219,958
Bridges and Structures	23	91,239,351
Schools	35	5,537,495
Hospitals	14	2,300,500
Other buildings	57	11,647,160
Power projects	5	4,845,700
Recreation	3	377,200
Miscellaneous Improvements	23	2,336,450
Total	448	$255,457,771

* * * * * *

Millions are being spent for the generation of cheap electric power in various strategic locations, such as the Tennessee Valley and the Columbia River basin, where nature has made these developments possible.

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #162 Press Release #587 of the Federal Emergency Administration of Public Works dated March 25, 1934, recording the announcement by the Administrator of allotments totalling $128,000,000. for power generating and distributing plants, including both federal and non-federal projects. Of this total $104,160,000. is being spent by the Federal Government and $24,700,00. has been allotted to 50 non-federal projects. The principal ones of such projects are described and the allotments for non-federal projects are listed. This list includes the allotments for four Alabama towns. Of these four three are Florence, Sheffield and Tuscumbia. The press release states that "two of the municipal allotments were made to Alabama towns to enable them to bring electricity from the government plant at Muscle Shoals and distribute it locally."

The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit #164 Press Release #912
513 of the Federal Emergency Administration of Public Works which notes a report by the Administrator that "PWA has made allotments totalling $192,518,900, which will result in the generation and distribution of cheap electricity by publicly owned power plants and distribution systems." The Federal Government is spending $146,250,000. of this money for five giant projects; the Bonneville and Grand Coulee dams and power plants on the Columbia River in the Pacific northwest section of the country, the Fort Peck dam on the Missouri River in Montana, Boulder dam and power plant on the Colorado River and the Casper-Alcova project in Wyoming. The release also states that "the money being spent by the Tennessee Valley Authority for power development on the Tennessee River" is not included in the amount reported by the Administrator as being spent by the federal government, for the TVA money was not allotted by PWA but was earmarked by Congress and allotted by the President. The allotments for non-federal electricity projects in various municipalities are listed. A number of non-Federal allotments were made for modernizing old plants to enable them to give better service to the communities owning them.

514 As bearing upon the allegations of the bill setting forth a national plan and program, of which the activities of PWA are a part, to further public ownership, to reduce rates charged for electricity, etc., the plaintiffs offered a series of documents:

Plaintiffs' Exhibit #165 for identification is Senate Document 110, 73rd Congress, Second Session, offered on account of the message from the President contained therein on the proposed ratification by the Senate of the "St. Lawrence Treaty with Canada". The President stated:

"The other great objective provided for in the treaty relates to the development of electric power. As you know, I have advocated the development of four great power areas in the United States, each to serve as a yardstick and each to be controlled by government or governmental agencies. The Tennessee Valley plants and projects in the Southeast, the Boulder Dam on the Colorado River in the Southwest, the Columbia River projects in the Northwest are already

under construction. The St. Lawrence development in the Northeast calls for action. This river is a source of incomparably cheap power located in proximity to a great industrial and rural market and within transmission distance of millions of domestic consumers.

"The Legislature of the State of New York by unanimous vote set up the necessary State machinery during my term as Governor of New York and the State stands ready to cooperate with the Federal Government in the distribution of power in accordance with what I believe is today a definite national policy."

The plaintiffs' exhibit #166 for identification is a compilation dated November, 1934, gathered for the National Power Policy Committee by its Executive Secretary, consisting of public statements by Franklin D. Roosevelt as President and as Governor of the State of New York,
515 and entitled "Power Views of Franklin D. Roosevelt" and submitted to Harold L. Ickes, Chairman of the Committee. The compilation bears the identifying number P. W. 22982. It includes several state papers by Mr. Roosevelt as Governor of New York. Also included are excerpts from the speech of Governor Roosevelt at Portland, Oregon on September 21, 1932. These excerpts are in part as follows:

". . . I have strengthened the belief that I have had for a long time, and that I have constantly set forth in my speeches and papers in my work as Governor of the State of New York, that the question of power, of electrical development and distribution is primarily a national problem.

". . . Let me make it clear that I have no objection to the method of control through a public service commission. It is, in fact, a proper way for the people themselves to protect their interests.

"In practice, however, it has in many instances departed from its proper sphere of action and, I may add, from its theory of responsibility.

"It is an undoubted and undeniable fact that, in our modern American practice, the public service commissions of many states have often failed to live up to the high purpose for which they were created.

"In many instances their selection has been obtained by the public utility corporations themselves. These corpora-

tions have often influenced, to the prejudice of the public, the actions of public service commissions.

". . . The reason that we cannot take advantage of our own possibilities is frankly and definitely because many selfish interests in control of light and power industries have not been sufficiently far-sighted to establish rates low enough to encourage widespread public use. The
516 price you pay for your utility service is a determining factor in your use of it.

". . . I do not hold with those who advocate government ownership or government operation of all utilities. I state to you categorically that as a broad general rule the development of utilities should remain, with certain exceptions, a function for private initiative and private capital.

". . . I therefore lay down the following principle: That where a community, a city or county or a district is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government, one of its functions of home rule, to set up, after a fair referendum has been taken, its own governmentally-owned and operated service.

"That right has been recognized in most of the States of the Union. Its general recognition by every State will hasten the day of better service and lower rates.

". . . State-owned or Federal-owned power sites can and should properly be developed by government itself. When so developed, private capital should be given the first opportunity to transmit and distribute the power on the basis of the best service and the lowest rates to give a reasonable profit only.

"The right of the Federal Government and State Governments to go further and to transmit and distribute where reasonable and good service is refused by private capital gives to the government, viz., the people, that same very essential 'birch rod' in the cupboard.

". . . Here you have the clear picture of four great government power developments in the United States, the St. Lawrence River in the Northeast, Muscle Shoals in the Southeast, the Boulder Dam project in the Southwest, and, finally, but by no means the least of them, the Co-
517 lumbia River in the Northwest. Each one of these will be forever a national yardstick to prevent extor-

tion against the public and to encourage the wider use of that servant of the people—electricity.

"The power issue, where vigorously handled in the public interest, means abundant and cheaper current for American industry, reduced rates and increased use in millions of urban and rural homes, and preservation of our water power resources in coordination with flood control, reclamation and irrigation."

Included in the compilation are excerpts from the book by Franklin D. Roosevelt entitled "Looking Forward", March, 1933, as follows:

"The regulation commission must be a tribune of the people, putting its engineering, accounting and legal resources into real use for the purpose of getting the facts and doing justice to both the consumers and the investors in public utilities. This means positive and active protection of the public against private greed.

"Therefore I lay down the following principle: that where a community or a district is not satisfied with the service rendered or the rates charged by a private utility, it has the undeniable right as one of its functions of government, one of its functions of home rule, to set up, after a fair referendum has been taken, its own governmentally owned and operated service.

"This right has been recognized in most of the states of the Union. Its general recognition by every state will hasten the day of better service and lower rates.

"State-owned or Federal-owned power sites can and should properly be developed by government itself. When so developed, private capital should be given the first opportunity to transmit and distribute the power on the basis of the best service and the lowest rates to give a reasonable profit only."

518 Also included in the compilation is the message to Congress of President Roosevelt dated April 10, 1933, dealing with proposed legislation for the development of the Tennessee River. Also included in the compilation is the President's letter creating the National Power Policy Committee, set forth supra as plaintiffs' exhibit #138. There is also included President Roosevelt's speech at Tupelo, Mississippi, dated November 18, 1934 wherein he says:

"I cite certain figures for the benefit of the gentlemen of the press, who have come hither from many climes. I am told that from March of this year, when you started using TVA power, the consumption of power for residential purposes has risen from 41,000 kilowatts to 89,000 kilowatts, an increase of 126 per cent. I understand that from the financial point of view, in spite of various fairly tales that have been spread in other parts of the country, your power system is still paying taxes to the municipality. That is worth remembering. Furthermore, that, as a whole, it is a remarkable business success.

"I talk about those figures first because it has been so often wrongly alleged that this yardstick which we are using could not be applied to private business and because a Government yard-stick recieves so many favors, that it is left off from paying this and paying that and paying the other thing. Well, we are proving it in this Tennessee Valley that by using good business methods we can instruct a good many business men in the country."

Aside from the foregoing the compilation likewise sets out Press Release #989 of the Federal Emergency Administration of Public Works, and the portion of the "Johnson Act" Public Number 222, 73rd Congress, May 14, 1934, that limits the jurisdiction of Federal District Courts with respect to injunctions against state rate making bodies. Section 10 and 11 of the Act setting up the Tennessee
519 Valley Authority are also included in the compilation.

The compilation likewise includes a release to the public press by the Tennessee Valley Authority dated Au-
520 gust 25, 1933, entitled "The Power Policy of the Tennessee Valley Authority", which is as follows:

"1. The business of generating and distributing electric power is a public business.

"2. Private and public interests in the business of power are of a different kind and quality and should not be confused.

"3. The interest of the public in the widest possible use of power is superior to any private interest. Where the private interest and this public interest conflict, the public interest must prevail.

"4. Where there is a conflict between public interest and private interest in power which can be reconciled without injury to the public interest, such reconciliation should be made.

"5. The right of a community to own and operate its own electric plant is undeniable. This is one of the measures which the people may properly take to protect themselves against unreasonable rates. Such a course of action may take the form of acquiring the existing plant, or setting up a competing plant, as circumstances may dictate.

"6. The fact that action by the Authority may have an adverse economic effect upon a privately-owned utility, should be a matter for the serious consideration of the Board in framing and executing its power program. But it is not the determining factor. The most important considerations are the furthering of the public interest in making power available at the lowest rate consistent with sound financial policy, and the accomplishment of the social objectives which low cost power makes possible. The Authority cannot decline to take action solely upon the ground that to do so would injure a privately-owned utility.

"7. To provide a workable and economic basis of operations, the Authority plans initially to serve certain
521 definite regions and to develop its program in those areas before going outside.

"8. The initial areas selected by the Authority may be roughly described as:

(a) The region immediately proximate to the route of the transmission line soon to be constructed by the Authority between Muscle Shoals and the site of Norris Dam.

(b) The region in proximity to Muscle Shoals, including northern Alabama and north-eastern Mississippi.

(c) The region in the proximity of Norris Dam (the new source of power to be constructed by the Authority on the Clinch River in northeast Tennessee.)

"At a later stage in the development it is contemplated to include, roughly, the drainage area of the Tennessee River in Kentucky, Alabama, Georgia and North Carolina, and that part of Tennessee which lies east of the west margin of the Tennessee drainage area.

"To make the area a workable one and a fair measure of public ownership, it should include several cities of sub-

stantial size, (such as Chattanooga and Knoxville) and, ultimately, at least one city of more than a quarter million, within transmission distance, such as Birmingham, Memphis, Atlanta, or Louisville.

"While it is the Authority's present intention to develop its power program in the above-described territory before considering going outside, the Authority may go outside the area if there are substantial changes in general conditions, facts, or governmental policy, which would necessarily require a change in this policy of regional development, or if the privately-owned utilities in the area do not cooperate in the working out of the program.

"Nothing in the procedure here adopted is to be
522 construed in any sense a commitment against extending the Authority's power operations outside the area selected, if the above conditions or the public interest required. Where special considerations exist, justifying the Authority going outside this initial area, the Authority will receive and consider applications based on such special considerations. Among such special considerations would be unreasonably high rates for service, and a failure or absence of public regulation to protect the public interest.

"9. Every effort will be made by the Authority to avoid the construction of duplicate physical facilities, or wasteful competitive practices. Accordingly, where existing lines of privately-owned utilities are required to accomplish the Authority's objectives, as outlined above, a genuine effort will be made to purchase such facilities from the private utilities on an equitable basis.

"10. Accounting should show detail of costs, and permit of comparison of operations with privately-owned plants, to supply a 'yard-stick' and an incentive to both private and public managers.

"11. The accounts and records of the Authority as they pertain to power, will always be open to inspection by the public."

There is also included an excerpt from the 13th Annual Report of the Federal Power Commission dated 1933, reciting:

"The Federal Water Power Act represents a declared policy of the Congress to provide for the improvement of navigation and the development of water power through the

instrumentality of private and governmental agencies, which, by the act, may be licensed to use, upon prescribed conditions, the water power of streams subject to Federal jurisdiction or to use public lands. These conditions to the granting of such valuable privileges are intended to promote the fundamental conservation purposes of the act through improvement of navigation and development of water power, and at the same time to safeguard the public interest by protecting the consumers of the generated power against exorbitant charges.

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". . . Pursuant to an Executive order of the President (Executive Order No. 6251, Aug. 19, 1933, under title II of the National Industrial Recovery Act), the Commission has undertaken a survey of the water resources of the Nation as they relate to the conservation, development, control, and utilization of water power and of the relation of water power to other industries and to interstate and foreign commerce. The allocation of necessary funds available under the public works section of the National Industrial Recovery Act for this purpose permits the Commission to make an investigation prescribed by section 4 (a) of the Federal Water Power Act, which heretofore has not been possible for lack of necessary funds.

"On the basis of this survey the Commission is directed to assist the Federal Emergency Administrator of Public Works in formulating a comprehensive program public works pertaining to the development of water power and the transmission of electrical energy. Under authority of this Executive order, the Commission has also instituted an investigation of the cost of the transmission of electrical energy in the United States and its distribution to consumers, this being in harmony with the purpose of Senate Resolution 80, introduced by Senator Costigan. A still further duty imposed by this Executive order upon the Commission is that of investigating and reporting upon applications for loans referred to it by the Federal Emergency Administrator of Public Works for construction of public-works projects involving the development and utilization of electric power. In order to assist in expediting the national recovery program, the Commission has given immediate consideration to such applications in reporting on the engineering and economic aspects of the proposed projects."

Marked for identification as plaintiffs' exhibit
524 #167 was the text of the speech of President Roosevelt dedicating Boulder Dam on September 30, 1935, which included the following passage:

"These great Government power projects will affect not only the development of agriculture and industry and mining in this section they serve, but they will also prove useful yard-sticks to measure the cost of power throughout the United States. It is my belief that the Government should proceed to lay down the first yardsticks from this great power plant in the form of a State power line, assisted in its financing by the Government, and tapping the wonderful natural resources of southern Nevada. Doubtless the same policy of financial assistance to State authorities can be followed in the development of Nevada's sister State, Arizona, on the other side of the river."

Marked as plaintiffs' exhibit #168 for identification was the text of the address of Governor Roosevelt on September 30, 1932, at Milwaukee, Wisconsin, wherein he stated, among other things:

"After all, my friends, a public utility differs from a purely private business, because the utility is essentially a monopoly and therefore must be regulated by the people themselves through their government, with two broad purposes in mind:

"First, that they be compelled to give good service, and, second, that they be allowed to charge rates to the public that will bring to them only a reasonable return on their actual investment.

"We recognize, also, that because government regulation is often unable to keep up with the various devices of private utility companies that seek to evade the broad public policy, from time to time it is necessary for government to have what I called up in Portland, Ore., a 'birch rod' in the cupboard—two birch rods, in fact.

525 One of them is the development of government of certain great water-power resources to be used as a yardstick for the benefit of the people; and I have spoken out on the West Coast of four great natural resources which belong to the people, one on the St. Lawrence River, another the Muscle Shoals development, a third the Boulder Dam development and the fourth on the Columbia River in

the Northwest, which must never be allowed to be developed by anybody but the government itself.

The other 'birch rod' is the principle of public policy which would allow any community or county or city or any town or any village or any district actually to engage in the supplying of electricity—that great hand-maiden of the home, the farm and the factory—to supply them and industry if such community or district believes that they are unable to obtain adequately low rates or adequately good service from the private company."

Marked as plaintiffs' exhibit #169 for identification is the text of the address of Governor Roosevelt on September 24, 932, at Los Angeles, California, wherein he said, among other things:

"I have spoken on several occasions of the interest of government in hydro-electric power. You know of one project at Boulder Dam, the project which for this whole section of the country is to act as a yard-stick for the generations to come. I congratulate you and rejoice with you, but I want to point out to you that it is only one part of what the National Government can do toward this same end. Up in the Northeastern section of the country it so happens that there flows a great river, the St. Lawrence River, and its American section is capable of generating over a million horsepower, and we in the Northeastern part
526 of the country hope that that will be developed by the Government to act as a yard-stick on the charges and the service by private companies for the benefit of the whole section.

And then down in the Southwest part of the country nature has given us Muscle Shoals to act in exactly the same capacity for that part. And in the Southwest we have Boulder Dam. In the Northwest, the fourth corner, the fourth quarter of the country, nature has given us the Columbia River."

Marked as plaintiffs' exhibit #170 for identification was the text of the address of President Roosevelt delivered at the site of the Bonneville Dam on the Columbia River on August 4, 1934, wherein he said, among other things:

"Two years ago when I was in Portland I said the principle of government needs yardsticks so that the people in this country will know whether they are paying the proper price for the electricity of our times.

I conceived the idea that the government could create yardsticks. One has already been started on the Colorado River. Two other yardsticks have been undertaken, the Tennessee and the Columbia, and the fourth—the St. Lawrence—is going to be started."

The foregoing exhibits #165 to 170 for identification were separately exhibited to the Court and separately offered in evidence to prove the existence and objectives of the National Power program as alleged in the bills of complaint and to show the part played therein by PWA. Among other things plaintiffs' counsel stated:

"While this is a suit against Mr. Ickes as Administrator of PWA, the President is the real controlling administrator of PWA, and I assume, in any controversy, would dominate and determine its policy.

527 We offer them, further, because I am trying to connect up with everything because we are trying to make a record, and we contend that Mr. Ickes' book, which I must concede is excluded, and some of the other documents, show that Mr. Ickes has adopted the President's statement on the National power program as a statement of that program and of the part of the program which PWA seeks to carry out. That is, we offer it to show the objectives which are sought to be obtained by this National power program, and for the further reason that it appears, we think, that Mr. Ickes and others are acting together in carrying out this program."

The defendants objected separately to each of the documents "as irrelevant to any of the issues in these cases". The objections were sustained and exceptions separately allowed.

527A The plaintiffs then offered a series of press releases of the Tennessee Valley Authority; attached to them was a certificate of the Director of Information of the Tennessee Valley Authority stating:

"I hereby certify that the attached papers are correct copies of or extracts from documents furnished by me to the press upon my own responsibility and without any formal approval by any member of the Board of Directors of the Tennesse Valley Authority.

(sgd) W. L. STURDEVANT"

The press releases were as follows:

Marked as plaintiffs' exhibit #175 for identification was a TVA press release containing an address
528 delivered in Atlanta, Georgia, on Nov. 10, 1933, by Director David E. Lilienthal, Director and General Counsel of TVA, stating among other things:

"The Tennessee Valley Authority Act marks the beginning of a new national power policy and national power program. This new national policy has two major objectives. The first objective is more effective protection of the public interest, by the setting up of a measure of public operation of power as a 'yardstick'. The second objective of this new national policy is a greatly increased use of electricity in the homes, the farms, and the factories of the United States—an electrified America. * * * * *

"The national power policy of the President and the Congress written into the Tennessee Valley Authority Act recognizes that electric power, next to the soil, is our greatest resource. It recognizes that the people must maintain public control of this liberating force. This is the first objective of the national power policy to which I have referred.

"In order to comprehend fully the reasons for this phase of the program, it is necessary to recall what has been happening in the United States during the past ten years. It is necessary to understand that the people back home have become thoroughly aroused; that they are determined that the disgraceful looting of the public business of power shall not be repeated. You are all familiar with the sordid story. I need not recall to your minds the quarter of a million dollars which that leading citizen of Greece, Mr. Samuel Insull, paid to the Chairman of the State Commission which was supposed to be regulating his Illinois utilities. Those of you who are investors are familiar with the story of how some operating utilities were bled of their assets by speculating holding companies. You investors will recall the dizzy pyramiding of stocks, of bare-faced
write-ups, of unconscionable bonuses, of the pur-
529 chase of utility plants at outrageously high figures and the issuance of securities on the basis of such prices. Instances of these practices can be cited to you from coast to coast.

"I have no desire to intimate that every public utility followed such practices. There were many notable exceptions. But there can be no question that in the last decade the power business was dominated by financial pirates. * * *

"Now that is what had been going on throughout the United States. Regulation by commissions had in many states proved ineffectual. In some states it was perfectly obvious that the regulators were not regulating the utilities, but in effect, the utilities were regulating the regulators. In other states, the regulatory commissions were doing an honest and sincere job, but were hampered by the interminable procedure of regulation, with rate cases sometimes dragging through a decade. And so, to supplement regulation by commissions, Congress passed the Tennessee Valley Authorities Act. This Act is not an assault upon private ownership and management of public utilities. But it is a determined attack on private mis-management of the public business of power at the expense of the people back home—consumers and investors alike. * * *

"It was with such a background that Congress passed the Tennessee Valley Authority Act, and set up a measure of public operation of the power business. This public operation is to serve as a yardstick by which to measure the fairness of electric rates. It has an additional function. It is a reminder that electricity performs a public service. It is a reminder that unless that business is conducted by private corporation with fairness, without financial jugglery and with a due sense of responsibility to the paramount public interest, that the public at any time may itself assume the function of providing itself with
530 this necessity of community life."

"What the Tennessee Valley Authority is required to do in its power program is to set up an area for power operations. That area is to be on a comparable basis with typical private operations. To set up such a "yardstick" the Authority obviously must undertake to serve an area which is large enough and sufficiently concentrated, and with an adequately diversified industrial, commercial and residential load to provide a fair test. As business men, it is apparent to you that if the Authority is to serve only

the parts of a territory which a private utility has not chosen to serve, or is to serve only sparsely populated areas, the result of our operations cannot possibly be set up as a measuring rod. The Authority will necessarily have to undertake to serve a balanced area, including some cities of substantial size, good farm territory and reasonably favorable distribution possibilities.

This power program is a constructive measure. Congress has not declared a national policy against the private ownership and operation of public utilities. It has rather provided for an additional measure of public protection against abuses in the conduct of a business which, by its very nature, is a matter of fundamental public concern."

The objective of making electricity more broadly available looks to the electrification of America. We have a tremendous surplus supply of electricity in the country as a whole. Within the Tennessee Valley privately owned companies have facilities between 30% and 40% in excess of demand. The TVA is erecting more facilities. We must drastically revise rate structures for electricity. The rate levels have been the greatest single obstacle to increased use; they must be revised downward. High rate levels are due to tradition, to monopoly control by utilities, to the pressure of outrageous capital structure. The plans
531 of TVA to furnish lower rates afford the quickest means of accomplishing rate revision throughout the country. This is an essential part of the new national program inaugurated by the TVA Act.

Marked as plaintiffs' exhibits 177, 178, 179, 183 and 184 for identification were public releases of TVA giving the texts of addresses by Director Lilienthal made in the latter part of 1933 and early 1934 in Chattanooga, Memphis, Nashville, before the American Academy of Political and Social Science in Philadelphia, and before the League of Women Voters in Boston, wherein his statements were on the same subjects as those included in plaintiffs' exhibit 175 for identification.

Marked as plaintiffs' exhibit 176 for identification was a public release of TVA entitled "General Information" dated December, 1933, stating, among other things, that the objectives of the TVA include the utilization of Muscle

Shoals as a yardstick in determining the relative costs of public and private power operation. The release also identifies the statement included in plaintiffs' exhibit 166 for identification, *supra*, there entitled "The Power Policy of the Tennessee Valley Authority", as a statement by the Authority of its power policy, and as a statement of a major policy.

It is likewise stated that the region to be served by TVA includes northern Alabama, and that "every effort will be made to avoid the construction of duplicate physical facilities, or wasteful competitive practices. Accordingly, where existing lines of privately owned utilities are required to accomplish the Authority's objective, a genuine effort will be made to purchase such facilities on an equitable basis." There is also set out in detail the rates to be charged by TVA for electricity, and those to be charged to their consumers by municipalities purchasing from TVA which rates are fixed by TVA in the contract between TVA
532 and such municipalities.

The foregoing TVA releases were issued by the Director of Information of the Tennessee Valley Authority. The Board of Directors of the Tennessee Valley Authority had prior to the issuance of these releases adopted the following minute:

"It was decided that all publicity shall issue through the Publicity Department and that special publicity dealing with particular phases of the work shall have the approval of the director concerned before it is released."

Marked as Plaintiffs' Exhibit 181 for identification was a public TVA release which identifies David E. Lilienthal as the Director of TVA in charge of its power program.

The foregoing exhibits 175-179, 181, 183 and 184 for identification were in each of the cases separately offered, and exhibited to the Court, to show the nature and purpose of the nat nal power program of which the PWA power program is a part, namely a program to foster public ownership and to reduce the rates of local electricity utilities, and further to show the scheme which the PWA defendants and the Tennessee Valley Authority, and particularly its power Director Mr. Lilienthal, have been cooperating to carry out in the Alabama towns in suit and else-

where. Plaintiffs' counsel referred to evidence, theretofore introduced, showing this cooperation with respect to some of the Alabama towns. The defendants objected to the Exhibits separately on the ground "That they are irrelevant to any of the issues in these cases, and also on the ground that they are incompetent and not binding against any of the defendants". The objections were severally sustained and exceptions were separately noted.

The plaintiffs offered and there were received in
533 evidence the following Exhibits:

Exhibit 194. Press release No. 33 of the Federal Emergency Administration of Public Works dated August 1, 1933, states that Circular No. 1 of the PWA had been ordered sent to all state PWA officers for their guidance in handling non-federal applications.

Exihibit 195. The text of an address by the Administrator, Harold L. Ickes, at the United States Conference of Mayors in Chicago on September 23, 1933, which among other things states:

"It is now largely in the hands of the mayors of our cities to determine whether the Public Works Program will fully serve its purpose in aiding in the economic recovery of the country. Our National Treasury is waiting to be drawn upon for hundreds of millions of dollars for useful public works. The Administration in Washington can approve your projects and advance funds necessary to complete them."

"The Public Works Program, contemplating as it does the expenditure of funds in excess of $1,750,000,000 for State and municipal projects, offers the greatest opportunity for municipal improvements in the history of any country. We are willing to advance you as an outright gift 30 percent of your outlay for labor and material on an approved plan. We ask you to pay for the balance of the project. But we are willing to help you to finance your share. We will advance you the remaining 70 percent upon approved security and by approved security I don't mean that we will be as finicky about the security that you may offer as would be the investment bankers with whom you are accustomed to deal. We will lend you this 70 percent at 4 percent interest and permit you to amortize it over a period not to exceed 30 years.

"Here is an opportunity to build necessary and
534 desirable public works on more favorable terms than you have ever had before or than you may ever have again. Do you need new water works, or an extension of your present plant? Do you want a new or improved sewage system? Do you require bridges or viaducts or public buildings or roads or new schools? These things and others you may have on unbelievable generous terms.
• • •

"Naturally, the purpose of the Public Works Program is not merely to do work for the sake of doing the work. We want to increase buying power because it is realized that without increasing buying power our recovery program will fail. In this the municipalities are as much interested as the Federal Government.

"If at the same time that we increase buying power we build useful and socially-desirable public works, we are accomplishing two fine results by the same effort. I need not point out to you that for every hundred thousand men at work on public works projects there are at least an equal number at work back of the lines in saw mills, in steel mills, in factories, in quarries, and on railroads, producing materials and performing services necessary to supply the men on actual projects with what they need for their work. And as these men on the works and back of the lines acquire buying power, they are in a position to increase the buying power of others. They will be buying more clothing. They will be sending their children to school. They will be able to afford more and better food. A new automobile will not be beyond their hopes. They will want to repaint their houses and repair them. Thus, they will be helping turn the wheels of industry, giving employment to those who in their turn will give further employment to others, until the recovery movement will be able to keep moving of its own momentum and the stimulus which we are now ready and willing to provide in the way of public works will no longer be necessary."

535 Exhibit 196. Press Release No. 49 of the Federal Emergency Administration of Public Works dated August 13, 1933, notes that the National Planning Board of PWA is beginning a series of regional meetings to study

public works plans of various localities and to coordinate them into a national plan. The release states:

"In advance of its regional meetings the Board has already written to each regional advisor emphasizing the necessity to encourage and stimulate local and regional planning agencies as the best means of developing a national plan.

'Local initiative and responsibility is essential to both the rapid development and the permanent value of such a plan,' the Board said in its letter to regional advisors. 'It is, therefore, hoped that the regional Advisors will make, have, and take every reasonable opportunity to further the organization of planning boards and commissions where none now exist, or where they have ceased to function, to secure preparation of comprehensive plans by competent consultants, and encourage existing planning organizations.' "

Exhibit 198. Press Release No. 113 of the Federal Emergency Administration of Public Works states that Colonel H. M. Waite, Deputy Administrator of PWA had accepted an offer of the American Municipal Association to assist municipalities in preparing applications for projects.

Exhibit 197. Press Release No. 74 of the Federal Emergency Administration of Public Works, dated Aug. 24, 1933, announces the appointment of the executive secretary of the United States Conference of Mayors to act as liaison officer of PWA with municipalities. He will inform PWA of the progress of cities through the aid of the Public Works Program and will aid municipal officials in obtaining benefits of the program.

Exhibit 199. Press Release No. 116 of the Federal Emergency Administration of Public Works dated Sep-
536 tember 12, 1933, announces that in its speed-up drive PWA will send its Deputy Administrator, General Counsel, Finance Director and a member of its public relations staff on a 6000 mile airplane tour so the country may get a better idea of the purposes of PWA. The party will confer with and advise PWA state officials in the various regions. The need for speed will be emphasized.

Exhibit 200. Press Release No. 118 of the Federal Emergency Administration of Public Works announces allot-

ments for 19 non-Federal projects (none are power projects) and quotes Administrator Ickes as saying that the speeding up process in non-Federal allotments is bearing fruit, that PWA is not waiting on technicalities but makes tentative allotments so that plans may be completed and work started with a minimum of delay. He also stated:

"The law permits the Government to make outright grants up to 30 percent of the cost of labor and materials. Non-Federal public bodies which received allotments today took advantage of this opportunity to meet part of the expense of their local construction while they financed the balance through other means. All local officials would do well to study the opportunity offered by the section of the law permitting grants. It permits the Government to cause employment without bearing the entire financial load."

Exhibit 201. Press Release No. 135 of Federal Emergency Administration of Public Works, dated September 18, 1933, reports on the progress of the airplane tour. The Deputy Administrator wires the Administrator that municipalities realize the necessity for speed.

Exhibit 203. Press Release No. 144 of the Federal Emergency Administration of Public Works, dated September 23, 1933, notes end of the airplane tour and the Deputy Administrator reports that the PWA program is
537 gaining momentum. He found some opposition to the PWA wage scales but cleared away much misunderstanding with his explanation that the 30% grant more than offsets increased labor costs. Another of the party reported:

"By and large there will be plenty of projects sound enough to accept. The purpose of the Federal grant of 30 percent in some parts of the country was generally misunderstood. Col. Waite has made it clear that the grant more than covers the increased cost due to higher wages and shorter hours. The cities now realize that the grant is the Federal Government's contribution to restore purchasing power and that some of the responsibility rests upon the municipality itself."

"Past financial difficulties of the applicant will not necessarily stand as a bar to eligibility for aid under the Public Works Act. Unemployment must be helped. The ap-

plicant can show not only a budget currently balanced, but a projected spending program adjusted to known present factors."

Exhibit 204. Press Release No. 152 of the Federal Emergency Administration of Public Works, dated September 25, 1933, states, among other things:

"Within the past two weeks there has been a noticeable increase in applications for non-Federal loans due to the continued pressure of the PWA and the recent appeals of the Administrator to municipalities and local authorities for the submission of practical and useful applications. The number of non-Federal applications reaching Washington after submission to the State Advisory Boards have grown day by day. Approvals have now been granted to 131 non-Federal projects.

"Thus far the PWA has approved more than 2,200 projects of every character after examining and rejecting as many more which were found to be impractical or unnecessary and not designed to remove men from relief rolls to pay rolls."

Exhibit 205. Press Release No. 153 of the Federal
538 Emergency Administration of Public Works states, among other things:

"Federal agencies today continued to press PWA officials for additional allotments despite the fact they have received the great majority of the allotments to date. * * *

"Col. Waite asked the Federal officials seeking more funds what progress they had made in turning allotments already made into men at work. In most cases he was informed that contracts were being advertised or let and that where men were not actually at work on construction projects already they would be soon.

"The Deputy Administrator remained convinced that enough non-Federal projects would be presented to permit proper allotment of the balance of the $3,300,000,00 fund by the first of the year but warned non-Federal bodies not to be slow because Government agencies were clamoring for the remainder of the funds."

Exhibit 206. Press Release No. 209 of the Federal Emergency Administration of Public Works, dated Oct. 19, 1933, publicizes a report on state legislation by the assistant general Counsel of PWA, which states in part:

539 "The greatest obstacle with which the Public Works Program has met are the restrictions and limitations placed upon States and municipalities by the provisions of State constitutions and State statutes."

"Where, however, restrictions are purely statutory, a forceful executive and legislature willing to cooperate can make the benefits of the Act available to their constitutents. There are several means available in such a case: First, it is desirable, where such a law does not already exist, to pass a revenue bond act. Under a revenue bond act the security in back of the bonds is the revenue from the particular project involved, which is thus made to pay its own way without any additional burden to the taxpayer.

Another method is to authorize cities to borrow from the Federal Government without regard to any statutory debt limits and to dispense with the necessity of referendum elections, notice of hearings, and other time-devouring impediments, such as the requirement of public sale."

"A third method is to make the raising of the debt limit dependent on review by a State commission set up for the purpose."

"A fourth method, and probably the best, is exemplified by Chapter 26 of the Acts passed by the Extra Session of the General Assembly of Virginia in 1933. This law is in effect for a limited period of time and deals specifically with loans and grants by the Federal Emergency Administrator of Public Works to the counties, cities and towns of Virginia. It supersedes the provisions of all inconsistent laws, general or special, including charters, and confers powers which are in addition to the powers conferred in other laws. Instead of being simply a revenue bond act or removing the specific restrictions, or raising the
540 debt limit, and going no further, the Virginia Act accomplishes all of these results and at the same time sweeps away all statutory limitations on the issuance of bonds contained in other statutes of the States."

"The main object of any legislation should be to make more expeditious the obtaining of loans and grants from the Administration and the removal of the numerous restrictions, ambiguities and outright contradictions which at present seriously hamper municipalities when they come

to the Federal Emergency Administration of Public Works for a loan or a grant."

Exhibit 207. Press release 309 of the Federal Emergency Administration of Public Works announces an allotment of $250,000 to the National Planning Board of PWA to carry out its work of stimulating local planning of public works by States and cities; the program contemplates sending technical advisers to state and city planning units.

Exhibit 208. Press release 380 of the Federal Emergency Administration of Public Works, dated December 17, 1933, states that the Administrator has instructed PWA state engineers to continue getting non-federal projects in to Washington as fast as possible regardless of the approaching exhaustion of the public works fund. The Administrator acted when some States with large allocations slowed down in preparing projects.

Exhibit 209. Press release 1165 of the Federal Emergency Administration of Public Works, dated Dec. 30, 1934, states that the President had written the Governors of the States offering the assistance of PWA in preparation of legislation to enable public bodies to obtain fuller benefits of whatever additional public works program might be authorized by Congress. The Legal Division of PWA, which already has assisted States at their request in the preparation of legislation to facilitate the public
541 works program, was designated by the President to assist the States upon their invitation. A typical letter says in part:

"Our experience in the past eighteen months has brought to light the difficulty of gearing the legal machinery which has served municipalities of your State adequately for decades to the speed with which the Federal Government must extend credit to achieve desired results. It has been found that revision of the procedure relative to municipal financing is essential, at least for the duration of the existing emergency. I wish to submit for your consideration in formulating your legislative program, the following general suggestions:

(1) Simplification of the procedure for the authorization and financing by municipalities of public works projects, for example, by eliminating the requirement for an election

and in lieu thereof substituting a permissive referendum on bond issues, by shortening the periods of notices before such referendum elections, and by permitting the sale of bonds privately to the Federal Government.

(2) Conferring of additional powers upon municipalities to undertake public works projects and issue bonds to finance the same, including the relaxing of statutory limitations upon taxing power to pay debts, and the delegation of a broader authority to municipal officials to make such contracts with the Federal Government as are deemed in the best interests of the municipality.

(3) Creation of municipal improvement authorities without power to tax, but with power to issue bonds payable solely from the income of revenue-producing improvements, such as water, sewer, and electric light and power systems.

(4) Authorizing municipalities to engage in slum clearance, including condemnation of necessary lands, and the construction, operation and maintenance of low-cost
542 housing, to make contributions therefor, and to enter into contracts with the Federal Government in connection therewith.

(5) Providing for the creation of non-profit public benefit corporations or agencies to provide for the electrification of rural communities with the assistance of the Federal Government.

(6) Validation of bonds and other obligations heretofore issued by municipalities for public works projects and sold to the Federal Government.

If you will write me how you feel about these suggestions, I will request Administrator Ickes to have prepared such bills as may be deemed advisable.

Quite apart from the above suggestions, I think it would be helpful if arrangements could be made whereby the Public Works Administration is furnished with copies of all laws enacted at the forthcoming legislative session. This will materially aid the Administration in advancing funds on approved projects.

Very sincerely,

FRANKLIN D. ROOSEVELT."

Exhibit 211. Press release No. 1192 of the Federal Emergency Administration of Public Works states that PWA state engineers have been given questionnaires and schedules to be filled out by local public bodies in order to survey available public works projects which might
543 be useful in connection with the President's program. Projects providing for employment of the maximum amount of direct labor were emphasized.

Exhibit 212. Press release No. 1419 of the Federal Emergency Administration of Public Works, dated June 16, 1935, is an article by Administrator Ickes giving an accounting of his two-year stewardship. He emphasizes the employment given by PWA projects, pointing out that essential public works which in the ordinary course of events would have been delayed for many a decade now promote the material and cultural welfare of the Nation. To promote construction, PWA offered free grants of 30% of the cost of labor and materials. PWA checked the downward trend of construction. PWA had to chart its own course, set its own precedents, pioneer its entire program. Yet projects have been required to have lasting social usefulness, as well as giving employment.

Statisticians are without means of accurately estimating the numbers of these behind-the-lines workers, but evidence they have gathered indicates the figure approximately 2,000,000 whose employment was made possible largely through the expenditure of nearly $1,000,000,000 for materials. And each of these wage-earners, statistics show, provides for an average of four dependents.

Exhibit 213. Press release No. 1564 of the Federal Emergency Administration of Public Works states that the Administrator has announced that, stimulated by the President's order setting Sept. 12 (1935) as the deadline for receipt of applications, local public bodies have filed over 4000 applications for loans and grants and for grants only under the new program, under which 45% grants are given. A 10,000 mile airplane tour of PWA officials has been made in the interest of expediting the public works program, visiting virtually every state.

Exhibit 214. Dated November 16, 1933, is a mem-
544 orandum to all PWA state engineers over the name of H. M. Waite, the Deputy Administrator, stating:

"The following extract from a letter from one of
545 our State Advisory Boards is indicative of action that may be taken to stimulate the submittal of applications to the Public Works Administration. This scheme is meeting with success in a number of states.

'Yesterday we held the first of a series of projected meetings which will cover this whole state, carrying the program of PWA out into the country.

The Mayor was host at a luncheon to eighty-two guests. The Mayors, City Engineers, City Attorneys, interested citizens and members of the Seventh Congressional District were in attendance. Our Chairman and State Engineer with myself represented PWA.

The meeting was a distinct success. It provided information which set at rest many stories and rumors that PWA was Santa Claus in disguise. It opened the way to a number of Cities to undertake projects which had been discarded and it made clear to every one in attendance that the way has been provided, for those who can avail themselves of the privilege, to take men off relief rolls and put them on pay rolls with the very same money.

So successful does our Board consider the meeting that we have today scheduled similar ones in each Congressional District in the State.' "

Exhibit 215. Dated March 11, 1936, is letter of instructions No. 52 to State PWA directors and Division Heads over the name of Horatio B. Hackett Assistant Administrator, stating in part that state directors will not solicit applications as the PWA has no funds for allocations at this time.

Exhibit 216. Dated April 29, 1935, is Staff Order No. 1 of the Federal Emergency Administration of Public Works to all Division Heads setting forth a telegram from Administrator Ickes to all State Engineers authorizing them to accept new applications for non-federal projects,
546 applications to be prepared as in the past subject to a future change in PWA rules, and directing that this matter be given widespread publicity in each Engineer's territory.

The plaintiffs separately offered each of the fol-
547 lowing exhibits, marked for identification as indicated, and exhibited to the Court:

Exhibit 217. Press release No. 52 of the Federal Emergency Administration of Public Works, dated Aug. 15, 1933, announces the appointment of ten regional inspectors assigned to various regions. of the country, to be under the direction of Louis R. Glavis, head of the Division of Investigations of the PWA. These inspectors will be in charge of the PWA investigators in the field, with the duty to assure that PWA money is spent as intended, and to investigate complaints.

Exhibit 218. Press release No. 299 of the Federal Emergency Administration of Public Works, dated Nov. 20, 1933, states that as a safeguard against graft, waste and slipshod work inspectors will be assigned to check up on each non-federal project and that the inspection work will be directed by an Inspections Division which will see that money on non-federal projects is spent as intended.

Exhibit 219. Press release No. 452 of the Federal Emergency Administration of Public Works states that inspectors are assigned to projects from start to finish to see that work is done according to the plans and specifications submitted to PWA, that costly methods of construction and extravagant materials are not used, that the 30 hour week, minimum wage, and other provisions of the PWA act are observed on non-federal projects.

Exhibit 220. Press release No. 460 of the Federal Emergency Administration of Public Works states that workmen on public works projects may make complaints to PWA inspectors as to any form of "kickback" or extortion and the inspector may require restitution. PWA will refuse to advance money under allotments where restitutions are not made. PWA holds the purse strings on every allotment until the work to be done is finished. Both the loan and grant will be paid over in installments or
548 deposited in escrow whence no withdrawals may be made except with the consent of PWA.

Exhibit 221. Press release No. 462 of the Federal Emergency Administration of Public Works states that local officials must show what the money has been spent for before they get it. Materials and methods used must be up to the standards as approved by PWA in the plans and specifications. Inspectors will require shoddy work to be torn out.

Exhibit 223. Press release No. 478 of the Federal Emergency Administration of Public Works announces the rescission of thirty allotments for non-federal projects in some cases because the recipients had failed to comply with the PWA requirements for the 30 hour week and with the minimum wage rates fixed by PWA.

Exhibits 225, 229 and 230. Press releases No. 558, No. 1818, and No. 1833 of the Federal Emergency Administration of Public Works announce further rescission of allotments for non-federal projects because of failure of recipients to comply with PWA requirements.

Exhibit 224. Press release No. 533 of the Federal Emergency Administration of Public Works announces that, pursuant to the determination of the Administrator and a resolution of the Special Board for Public Works, no project financed by public works funds is to be named without the prior consent of PWA nor may it be named after a living person.

Exhibit 226. Press release No. 721 of the Federal Emergency Administration of Public Works announces that the Administrator had disapproved a proposed contract between the St. Paul-Minneapolis Sanitary District and a firm of consulting engineers, and had exercised the government's right to supervise the project by ordering immediate beginning of the sewage works for the Twin Cities,
549 to be financed by PWA, with a board of nationally known engineers named by the Administrator to examine various phases of the project and supervise the plans subject to the Administrator's approval. There had been much bickering and dispute about the proposed contract with the engineers and the Administrator announced that he had little faith in the success of any contract for professional services when it is evolved from bitter controversy. The engineering board named by the Administrator will have many technical decisions to make to avoid waste or a type of plant not suitable for the community.

Exhibit 227. Press release No. 1046 of the Federal Emergency Administration of Public Works announces that PWA has demanded immediate termination of a construction contract between a contractor and the recipient

of a PWA allotment for a transit railway line. PWA acted on evidence from its inspectors of faulty construction by the contractor, and demanded that the recipient reorganize its engineering supervision staff in a manner satisfactory to PWA. Further funds would be withheld if the recipient failed to comply with the demand of PWA.

Exhibit 228. Press release No. 1647 of the Federal Emergency Administration of Public Works announces that, where projects are financed under the Emergency Relief Act of 1935, PWA will not be required by the Works Progress Administration to use labor from relief rolls in communities where sufficient relief labor is unavailable.

The purpose for which the foregoing Exhibits
550 were offered was stated by counsel for the plaintiffs as follows:

I may state that the purpose of offering these exhibits 217 to 230, inclusive, is to prove that PWA by contract exercised control over wages, hours of labor, conditions of labor wage preferences, plans and specifications of construction, and other matters of what we claim to be purely of state concern, on projects which were local non-Federal projects being constructed in the various states.

They show that this control was exercised by contract; that it was enforced by the appointment of a large number of inspectors who went about the country seeing that all rules and regulations of PWA were obeyed; and it was further enforced by control of the purse strings, as stated by the Administrator; and that wherever there was any failure to comply with rules and regulations of PWA the allotment was canceled and no money was advanced for the project, even though it was in process of execution. For example one exhibit, plaintiffs' exhibit 217, release No. 52, refers to the appointment of 10 regional inspectors under the direction of Mr. Glavis.

Counsel for the defendants' objected to the foregoing exhibits on the following ground:

Mr. Holtzoff: If your Honor please, we object to these exhibits as a group, and to each of them severally, on the ground that they are irrelevent, in that they do not relate to the projects here in litigation. The question before your Honor, if I may say so again, is the validity of 11 contracts

made or proposed to be made by the Administrator. Whether or not control over labor conditions was exercised by the Administrator in respect of other projects is immaterial and irrelevant. If the issue has any bearing in the case, it must be limited to those projects. In order to ascertain whether or not such control was exercised as to those projects, we must turn to what was done in respect to them, and to the contracts here in litigation.

551

As a matter of fact, the record shows that in none of the contracts are there any clauses conferring upon the Administrator the power to which my friend refers. In some of them the contracts were amended subsequent to the institution of these suits, in order to delete therefrom some of the clauses to which our adversaries so vociferously object. They are out of the case, and the only things before your Honor are the amended contracts. Therefore we respectfully submit that the evidence now offered is immaterial.

The offer of each exhibit was separately made in each case and separately objected to, the objections were separately sustained and exceptions separately granted.

Whereupon the following occurred:

552

Mr. Acheson. Your Honor, during the testimony of Mr. Rau, reference was made to two communications, one from the Administrator to the President, and one from the President to the Administrator. I should like to ask for those documents at this time. They have been subpoenaed.

* * * * * * * * * *

The Court. Are you going to produce them?

Mr. Frank. I want to make an explanation as to the nonproduction.

The Court. Very well.

Mr. Frank. These documents requested are described in the subpoena duces tecum as a letter dated September 8, 1934, from Harold L. Ickes, Federal Emergency Administrator of Public Works, to the President; and a memorandum dated Hyde Park, September 10, 1934, to Harold L. Ickes, Federal Emergency Administrator of Public Works, initialed in pencil "F. D. R."

Those papers are not being produced, for two reasons, the first of which I will state thus:

One of them is a memorandum dated Hyde Park, September 10, 1934, initialed in pencil "F. D. R."—obviously the President of the United States.

I am authorized by the President of the United States to say that he considers that document privileged; that he considers it not in the public interest, and prejudicial to the public interest and to the interest of the Government, that that memorandum should be produced.

As to the other memorandum, his views are the same. The memorandum addressed to the President falls in the same category, and the Administrator objects to the production of the documents, and is unwilling to produce them for like reasons.

After extended argument by Mr. Frank for the defendants and Mr. Baker and Mr. Acheson for the plain-
553 tiffs, the Court ruled as follows:

The Court. I do not think there is any question here at all. In fact, I am surprised that there really should be so much controversy about this. The attorneys for the plaintiffs have evidently got everything that could be found that had been printed or published. The last thing is a communication from the Administrator to the President, and the only purpose I can discover of that is to show that what the Administrator finally did was done by authority of the President.

The President, through Government counsel, asserts that in his opinion the disclosure of that would be detrimental to the public interest. I think I ought to respect it. It is not a question of personality of the President or of personality of the Secretary or of the Administrator; it is a question of the office itself. The question of privilege is sometimes confused with the question of exemption, the question of prohibition, the relation between attorney and client.

Certain things are prohibited: the testimony of wife and husband; testimony of a person who has had confidential relations with persons later deceased. There are a great many such things.

Then, of course, when you get down to the border line, where very grave things are involved, it seems quite hard

to send a man to the gallows when he might be acquitted by something that is favorably produced. We have not got that here. We have everything we can have of relevance to this issue. The last thing is a memorandum that the Administrator sent—or a letter—to the President, asking for instructions. What those instructions were, I do not know, but I would have to unhesitatingly say that what he did was done pursuant to what, in his opinion was sufficient justification for his actions.

And why there should be so much desire to get his
554 specific language, is more than I can understand.

But when he asserts that in his opinion it would be detrimental to the public interest to make that public, I have, I think, to respect it.

All these legal authorities are very interesting. The supposed derivation of the President's privilege from the immunities of the King is a matter of real historical interest, but that is not really important. We have here the question of the situation where, historically, the President has been exempt from divulging relations which he deems confidential between himself and one of his subordinates. And if that was not respected, just think of where it would lead.

Now, Mr. Baker will understand what I mean. I have been in a Government department; you gentlemen all know that. I have sat around a counsel table with the Attorney General, the Solicitor General, Solicitors from the different Departments, various employees of Departments, discussing some question as to, for instance, whether an appeal should be taken in a particular case. Half a dozen different attorneys have written recommendations, some recommending an appeal and some recommending that an appeal not be taken; we sat around there and threshed it out, and it was decided one way or another. Now, would it be conceivable that any attorney would have a right to subpoena those recommendations—and I simply cannot conceive it—showing that the appeal had not been taken in good faith, for instance, because one or two men had recommended against it?

I cannot conceive why confidential communications passing between the President or a cabinet officer and one of

their subordinates, with respect to the policy of some department, should be opened to public discussion; I can see no conceivable reason why that should be. It would be hard to think of a case, but it might be possible; let us take
555 the War Department, for instance; I do not doubt but the Secretary has had that experience. He and his subordinates conferred over certain matters and policies of the Department, certain officers made recommendations and certain officers did not make recommendations, certain officers recommended different things, and finally the Secretary had to decide what to do; and what he did was made a matter of public record.

Now, that is what we have here. I have no question or hesitation in finding that the action taken by Secretary Ickes was with the approval of the President; and that is all anybody can ask for. It is all anybody can ask for.

The Government is not asserting that it was not. If the Government were asserting that it was not taken with the approval of the President, that might be different. But that is not so.

It seems to me that we have spent more than ample time in this consideration. And of course it has been interesting; I love to think of these cases. As a matter of fact, it is easier for me to think, just now, than to talk, because I have such a bad throat.

But that is the view I have taken. I do not think there is any public necessity, so far as I can conceive, that could justify me in disregarding the solemn assurance of Government counsel that the President believes the making public of this communication of his to the Administrator, would be against the public interest. I cannot find justification for holding that it should not be regarded as confidential. I can see no reason for not regarding it as such. And I can see no harm coming to anyone from taking that position; because the only thing that could be shown by it, that has been suggested to me, is that what was done was done pursuant to his authority, with his approval. And enough has been shown to justify that.

And as I say, there is no question of the personal-
556 ity; it is not whether it is President Roosevelt or President Coolidge or President Wilson or Pres-

dent Madison. It does not make any difference who it is: The making public, under circumstances which are entirely devoid of any necessity, of confidential communications between officers of the Government—the President and one of his assistants, or between one of his assistants and some of his subordinates—if once recognized, would in my opinion lead to very grave consequences. And if that position is to be taken, it is to be taken by someone wiser than I.

So I shall sustain the position; I do not know just how it arises. But I shall not ask that these papers be produced pursuant to the subpoena.

Mr. Acheson. May the record show an exception?

The Court. The record will show the appropriate exception.

Plaintiffs introduced a Stipulation Agreement
557 which was received in evidence as Plaintiffs' Exhibit No. 246. This stipulation agreement was signed by attorneys for the defendants and for the plaintiffs and stated that the letter set forth below was a true copy of a letter sent by the Federal Emergency Administration of Public Works Advisory Board of Alabama under date of August 18, 1933, to all mayors or similar municipal executives of all towns and cities located in the State of Alabama. The letter read as follows:

(letterhead)

Federal Emergency Administration of Public Works
State Advisory Board

"Dear Sir:

"To quickly provide unemployment relief the President, under the Act creating the Federal Emergency Administration of Public Works, has named us as members of the State Advisory Board to review applications for loans for various classes of public works as may be submitted by municipalities and other public bodies, and to stimulate the submission of projects for such public works calling for labor employment.

"These classes of public works embrace municipal projects such as water works and sewerage systems, electric power and light plants, markets, viaducts, bridges, canals,

etc., and under the authority conferred upon the President he is empowered to make grants to municipalities or other public bodies not to exceed 30% of the cost of the labor and materials employed upon such project under terms as may be prescribed by him. The repayment of funds so advanced by the Federal government to public bodies can be amortized over a period of 20 to 30 years at low rate of interest.

"We submit the foregoing information with suggestion that should yourself and associate municipal authorities contemplate any public works we shall be very glad to consider such fiscal aid as is provided in the authority
558 conferred and it is hoped that the President's program for unemployment relief will prompt your immediate survey and your advices if there may be expected an application from your governing body for public works construction funds.

"We urge your cooperation for unemployment relief and would point out that construction of municipal projects at this time would serve both to cooperate with the President in his program for unemployment relief and provide your citizens with what may be needed facilities.

"We promise prompt consideration of any project submitted by you, requesting that you address reply to Secretary, State Advisory Board, Montgomery, Alabama."

"Very truly yours,

"MILTON H. FIES, *Chairman*
"MAYER W. ALDRIDGE, *Secretary*
"FREDERICK I. THOMPSON."

559 The plaintiffs introduced and there was received in evidence as plaintiffs' exhibit 247 a stipulation between plaintiffs and defendants noting their agreement that the plaintiffs Texas Utilities Company and the Alabama Power Company had exhausted, before these suits, whatever administrative remedies there were open to them with respect to the proposed loans and grants of federal funds which such plaintiffs attack in these causes.

The plaintiffs offered and there was received in
560 evidence as Plaintiffs' Exhibit 248 Executive Order 6174, June 16, 1933, which was the original order of

the President setting up the Special Board for Public Works. It provided among other things:

"2. I hereby appoint a Special Board for Public Works consisting of the following: The Secretary of the Interior, Chairman; the Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; Colonel George R. Spaulding and Assistant Secretary of the Treasury Robert.

"During the next 20 days it shall be the duty of the Federal Emergency Administrator of Public Works and the Board herein constituted to study and report to me on all public-works projects which have heretofore been submitted or shall hereafter be submitted."

Pursuant to subpoena the plaintiffs demanded:

The minutes or stenographic reports of those meetings of the Special Board for Public Works which considered, recommended, or determined the principles to be pursued by the Federal Emergency Administration of Public Works in allocating funds to non-Federal projects under Title II of the National Industrial Recovery Act; and the resolutions of the Special Board recommending or determining the principles which should be followed in allocating funds to non-Federal projects.

The defendants objected to producing the documents on the ground that the Executive Order gave the Board a life of only twenty days, that the Board had no power to act, and that whatever its deliberations with the Administrator were is irrelevant to these cases.

The plaintiffs requested them on the ground that the resolutions of the Board are the final things the President approved and it was relevant to have its rules which
561 showed how it acted.

The Court sustained the defendants objection and declined to require production of the documents on the ground that intradepartmental matters are not admissible in evidence. The plaintiffs were allowed an exception.

Whereupon the following occurred:

562 Mr. Acheson. We have subpoenaed all the administrative findings that have been made in determining the allocation of Federal funds to finance non-Federal electricity projects in all the cities involved in this suit.

We have used the term "administrative findings" there in the sense in which it has been used frequently by the Supreme Court, to mean a finding of fact, a determination of fact which is adopted and relied upon by the officer having the highest authority in making his final decision. It may be that we have already discussed every possible such finding, but I now state that by these administrative findings I am not asking again for the reports which the Court has excluded, that is, I am not asking for the reports of the engineering, the finance, and the legal division, nor of the Electric Power Board of Review. I am asking whether there are, aside from those things, any documents which may be fairly described as administrative findings of fact, and I ask the Government to produce those.

Mr. Scott. I am wondering if opposing counsel would at this time state for the record just what finding he means when he says "finding of fact or administrative finding by the Administrator." Is it a finding as to the public necessity and convenience? Is it a finding as to rates? Just what particular finding is it that they are inquiring about?

The Court. I do not know.

Mr. Scott. Nor do we.

Mr. Acheson. Your Honor, I think, has stated correctly that I do not know, because I do not know what exists. What I am really trying to do is to establish a negative. I want to be able to state at some point, that we have before us everything which the President or the Administrator, or any ultimate authority, found or ordered in connection with these projects, so that we will then have what I
562A am sure the Court will want to know about, the full legal hierarchy. We will have the Constitution; we will have the statute; we will have the order of the President, the order of the Administrator, and any further findings which they claim give legal validity to the action. If there were none, that is entirely satisfactory. I just want to know the fact.

Mr. Frank. We have now got everything, Mr. Acheson, that we think you think you want.

Mr. Jackson. Are you willing to state in the record that there are now in the record before the Court all administrative findings of fact that have ever been made in
563 all these cases now pending?

Mr. Frank. I do not know what the words mean.

We are trying to conjecture what they mean; and, sincerely and honestly, if we understand what they mean, the answer is Yes.

But, necessarily, it is a vague answer, because the question is vague. I certainly do not mean by that statement to say that the Administrator will not testify that he considered things other than the things before these gentlemen, because he did. He considered many things, as will appear, that were oral. If they are trying to get from me a statement that he did not, I certainly do not mean to give such a statement.

I just do not know. It is a "How big is a piece of wood?" question, and I do not know how to answer.

Mr. Jackson. Well, are there any of the administrative actions in this case that you say go to support the action taken?

Mr. Frank. That again is a difficult question. But if they are now referring to the Administrator, anything that he did or intended to do is finally merged in the execution of a contract.

And it seems to me that we have here a very simple question: That a statute authorized an administrative official, when certain things exist, to make a contract; and he has made the contract. Now, if counsel are contending, as I think they are, that every time an administrative official makes a contract, he has to go through all the formalities that the Interstate Commerce Commission or the Tariff Commission or the like must go through, then I say that such things do not exist.

The Court. The statute does not require it, and nobody is required to make findings, in the absence of a statute.

Mr. Frank. Do you mean in writing?

Mr. Acheson. I suppose if I ask for documents, I must mean in writing.

564 Mr. Frank. But as I understand the rule of law, it is—and the Court has not so long ago declared, by Mr. Justice Butler—that where an executive officer is acting and where there are conditions precedent to his action, there is a presumption that he has determined those things which are precedent. And in that sense the Administrator has made findings or else he has acted unlawfully.

But so far as documentary evidence is concerned, so far as I know you have everything in your hands.

The Court. I do not think you have to respond to a subpoena like that.

Mr. Frank. We just do not know what it means.

The Court. Of course I do not know what the defendants may put in here, but I have no doubt that the plaintiffs have exhausted everything of which they know, and that they want anything that they have not found.

Mr. Acheson. I think the answer is the reverse, your Honor; I think this is one of the few occasions where the answer is "No." We certainly should rather have it so.

The Court. It certainly would appear so, I think, unless the defendants themselves put in something.

Mr. Frank. If we understand the suggestion—and I think that we do, in a general way—the fact is that, as at the present time advised, they have everything of the character they have requested.

Mr. Acheson. We have also asked the Government to produce, by subpoena, the following: All documents containing the comprehensive program prepared by the Administrator and approved by the President, pursuant to the requirements of section 202 of the National Industrial Recovery Act.

The Court. I think I know what he means. The statute says that the comprehensive plan shall be made, and so forth. Now, what he wants to know is whether any comprehensive plan has been embodied in any document.

565

Mr. Frank. One, or more?

Mr. Acheson. Document or documents.

Mr. Frank. All right, here is this; this is "Senate Document No. 167, Seventy-third Congress, second session, Public Works Administration, letter from the Administrator of Public Works transmitting, pursuant to Senate Resolution No. 190, a report of the business of the Federal Emergency Administration of Public Works for the period ending February 15, 1934."

Mr. Acheson. May we have a list of what comprise the comprehensive program?

Mr. Frank. Well, you will have testimony on that sub-

ject. If you want everything that can be described as documentary evidence, I do not know that we can respond; because the comprehensive program in part will consist of all the projects which have been approved.

Now, if Mr. Acheson wants us to bring in all those, then we shall bring in not only the files relating to power projects but everything under the sun. Here is a list, up to a certain date, of approved projects. If he wants a subsequent list, we shall bring that in. If he wants a narrative of the work of P. W. A. in collecting information, more or less along the lines of Circular No. 1, why, we shall bring that in. But if he means, Is there a piece of paper or are there pieces of paper labeled "Comprehensive Program", then, so far as I know, there are not.

We will give Mr. Acheson a list of every project approved, if that is what he wants.

The Court. That is not what he wants. He wants to know if, before the commencement of this work, a comprehensive plan was laid out in a document.

Mr. Acheson. That is it.

566 The Court. And if it was not, he is going to say that everything you have done is void.

Mr. Frank. That is it.

The Court. And what he wants to do is to get you committed to that. And I think there is no reason why you should be committed.

His claim is going to be that there is a condition precedent to doing anything, and that there had to be a comprehensive plan drawn up in writing.

Mr. Frank. Which would have taken two years.

The Court. And which was not done; everybody knows it was not done.

Whereupon the plaintiffs, pursuant to subpoena,

567 demanded of the defendants all reports to the Administrator of the three PWA examining divisions and of the Electric Power Board of Review relating to the projects in suit. The following occurred:

Mr. Acheson. Yesterday your Honor excluded those when I asked for them, on the ground that they were incorporated by reference. I stated during the argument that they had been subpoenaed. I think Mr. Frank thought

that they had not been subpoenaed, so I should now like the record to show that, independently of the ground for request yesterday, I ask their production on the ground that they were subpoenaed, and that these are steps in the sifting of facts—formal steps which the plaintiffs are entitled to see, as a matter of right, in determining what was before the Administrator in a formal way. It may be that there were other things before him, too, so I am going to put the request on that ground.

Mr. Holtzoff. We decline to produce these papers on the grounds heretofore stated.

The Court. I will rule the same way.

Mr. Acheson. We note an exception to that.

Without pressing the point further, may I ask whether the Court said they were excluded on the ground that they were intra-departmental? Is that because they are confidential?

The Court. I exclude them on the ground that the plaintiffs are not entitled to have them. That covers almost everything. You have covered almost everything and taken an exception to each ground separately. You may have an exception on that ground. I do not think you are entitled to have them. I do not think they are relevant.

568 The plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 253 Executive Order of September 21, 1935, which is as follows:

Executive Order

Increasing the Limitation Contained in Clause (g) of Section 1 of the Emergency Relief Appropriation Act of 1935

WHEREAS I find it necessary, in order to effectuate the purposes of the Emergency Relief Appropriation Act of 1935 (Public Resolution No. 11, 7th Congress), to increase by $800,000,000 the limitation of $900,000,000, contained in clause (g) of section 1 of the said Act, on the amount which may be expended under the Act for loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia and self-liquidating projects of public bodies thereof:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me under the said Emergency Relief Appropriation Act of 1935, it is ordered that the said limitation be, and it is hereby, increased from $900,000,000 to $1,700,000,000.

FRANKLIN D. ROOSEVELT

The White House,
September 21, 1935.

569 The plaintiffs offered several further excerpts from Plaintiff's Exhibit 123 for identification, the "Back to Work" heretofore referred to, as admissions of the defendant Ickes. The Court indicated that the defendants' objections would be sustained, as before, the following colloquy occurring:

"The Court. I do not think a book like that is admissible as evidence in a case of this kind. There is no question raised about the authenticity of the book.

Mr. Holtzoff. No.

The Court. The book ostensibly comes from him, and there is no question that he was responsible for it. That is not the basis of the ruling. The basis for the ruling is not that he was not responsible.

Mr. Jackson. The authenticity was conceded, as I understand it, by Mr. Holtzoff.

Mr. Holtzoff. Yes; we do not claim that Mr. Ickes did not write the book."

Thereafter the defendants objected to each excerpt separately as it was offered, each objection was sustained, and to each ruling the plaintiffs were allowed exceptions. The excerpts offered and exhibited to the Court were as follows:

As bearing upon the issue of solicitation, indicating that from the very beginning the defendants were bent upon stimulating municipalities to apply for projects, the plaintiffs offered the first five complete sentences from page 20 of the book.

From the portion of the book dealing with the initial meetings of the Special Board for Public Works to formulate policies for the Administration of the public work program, the plaintiffs offered the last sentence of the first full paragraph on page 25.

From the portion of the book dealing with the
570 problems of organizing the administrative machinery for the public works program the full paragraph on page 51 was offered.

As a statement of the procedure of the PWA and the duties of its various divisions, the passage from the beginning of the first full paragraph on page 67 to the end of the last full paragraph on page 78 was offered.

All of these passages will be found in defendant's exhibit 12 infra.

In connection with the last excerpt, plaintiffs' counsel pointed out that it bore likewise upon the question raised in the cross-examination of the witness Wheeler, *supra* p. ...., as to the Administrator's sources of information.

With respect to the same question, and as bearing upon the duties of the Division of Investigations of PWA the plaintiffs offered in evidence, marked as plaintiffs' exhibit 254 for identification, a letter which was signed by Horatio B. Hackett, Assistant Administrator, and sent to the Mayor of the City of Wichita Falls, Texas. The letter, exhibited to the Court, stated:

"I have received by reference from the office of the Attorney General a copy of your letter dated February 11, relative to an investigation made by the Division of Investigations, Public Works Administration, at Wichita Falls and the alleged activities of the agents in connection therewith.

In answer to your inquiry, authority for the investigation was predicated upon the fact that Public Works Administration funds were involved. Since information had been received that the power trust was using illegal and unfair methods in opposition to the proposed light plant an investigation was deemed advisable in order to assure that the interests of the Government were properly protected.

I have ordered a further investigation and a rep-
571 resentative from this office will call on you in the near future, at which time I shall appreciate your cooperation."

The Defendants objected to its receipt in evidence on the ground that it related to an electricity project which was

not one of those in suit; the objection was sustained and an exception was noted for the plaintiffs.

The plaintiffs offered and there was received in
572 evidence as Plaintiffs' Exhibit 255 Press Release No. 1864 of the Federal Emergency Administration of Public Works which states that the research section of the PWA Projects Division had analyzed 1000 completed and finally audited construction projects and that it was found that the cost to the Federal Government, on the basis of a PWA grant of 30% of the cost of labor and materials, of keeping one man employed for a month was, according to types of projects, as follows:

Schools	$72.00
Other buildings	69.50
Sewer Systems	56.00
Engineering structures	73.00
Waterworks	70.50
Streets and highways	55.90
Flood control, water power	48.60
Power excluding water power	105.80
All others	45.20
All types	61.80

The release also states:

"The most common type of project in the first program was school building construction, with sewerage systems and waterworks coming next, followed by other common types of PWA construction such as bridges, streets, public buildings, and engineering structures."

The plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 256 pages 71-78 of the original 1934 edition of the Government Manual. This section deals with PWA and appears over the names of Harold L. Ickes, Administrator, and Henry T. Hunt, General Counsel. It states, in part, that $3,300,000,000 were appropriated to effectuate the National Industrial Recovery Act, that in each
573 State there is an advisory board and a state engineer for PWA, and that this organization with central control served to promote the public works program throughout the country in connection with non-Federal allotments. The basis for allotments has been social benefit,

economic feasibility, and financial, legal, and engineering soundness. Vast amounts have been allotted for Federal purposes, as road building in every State, naval construction, rivers and harbors work, Army housing, public buildings, soil-erosion control, forest conservation, irrigation, and power development, etc. Other large sums have been advanced in the form of loans and grants to States, municipalities, and other public bodies for projects such as waterworks, sewer systems, electric light plants, streets and highways, bridges, schools, hospitals, and recreational facilities. Still other large sums were set aside for loans to railroads and for slum-clearance and low-cost housing projects. In order to facilitate and expedite construction in the low-cost housing field, the Federal Emergency Housing Corporation was organized with an allotment of $100,000,000 from the public-works fund. An allotment of $400,000,000 was made to the Civil Works Administration. Any public body meeting PWA requirements may borrow, and is entitled to a grant as well which is not to exceed 30% of the cost of labor and materials. The purpose of the grant is to induce public bodies to undertake construction. The President of the United States is responsible for the program. "The law gives the President broad powers. The President may exercise all, any, or none of the powers it invests in him. The President has appointed an Administrator to exercise the powers of that office. He also has approved rules and regulations to carry out the purposes of the act." A survey in 1933 showed that the largest number of allotments had been made for waterworks, sewers, streets, schools, hospitals, bridges, power plants, and recreational facilities. Before a project is finally approved for an allotment "it must be found socially desirable and sound from legal, financial and engineering
574 standpoints". A project is financed by purchase of the applicants' general obligation or revenue bonds with 4% interest. If the applicant desires, the 30% grant will be made, without a loan, if the public body can show that it can otherwise finance the remainder of the cost. Classes of projects preferred for grants are (1) waterworks necessary for health and convenience of a community, (2) sewers of the same character, (3) sewage disposal

projects sufficient to render heavily used lakes or rivers safe as a water supply, and other sewage disposal projects, (4) municipal power plants, (5) other projects such as highways and streets opening new territory for homes and industry, and projects for transmitting electricity into territories not now served. The Technical Board of Review studies unusual projects, those involving difficult technical questions and those involving controversial issues. PWA polices the performance of all PWA contracts including labor and wage provisions, checks materials, and closely supervises all payments of money.

As Plaintiffs' Exhibit 257 there was offered and received in evidence the August, 1934, revision of page 71 of the 1934 Government Manual which states that the Deficiency Appropriation Act, fiscal year 1934, had provided an additional sum for PWA, not to exceed $500,000,000.

As Plaintiffs' Exhibit 258 there was offered and received in evidence the 1935 edition of the Government Manual, pages 449-454, which is the portion dealing with the Federal Emergency Administration of Public Works, appearing over the name of Harold L. Ickes, Administrator, and Henry T. Hunt, General Counsel. This contains the same information as that in Plaintiff's Exhibit 256, *supra*, but adds that the function of the Electric Power Board of Review is to review considerations of social desirability, financial and technical soundness, as to publicly owned electric projects. It is also stated that generally contracts
575 are required for work on all projects but in exceptional cases the state engineer with the approval of the Administrator may authorize work by force account.

As Plaintiff's Exhibit 259 there was offered and received in evidence the July, 1935, revision of pages 449-454 of the 1935 Government Manual which states that the life and functions of PWA were extended for two years under the Emergency Relief Appropriation Act of 1935, that the amount of grants has been increased to 45%, and that the interest rate for loans to public bodies is 3%. The Government Manual for 1936 states that the interest rate for loans to public bodies is 4%.

The plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 260 a letter from the President

to the Secretary of the Treasury allocating $400,000,000 to PWA from the Appropriation Act of 1934. The letter follows:

(Here follows photostat marked page No. 576)

577 The plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 261 Senate Document 184, 74th Congress, 2d session, which was a report dated March 6, 1936, from Harold L. Ickes, Administrator of PWA, to the Senate in response to a Senate Resolution requesting a list of all gas or electricity projects with an indication as to which projects are under construction and which are delayed because of litigation. The report states:

"On February 15, 1936, there were [illegible]69 allotments outstanding to public bodies, other than the Federal Government, for electric and gas projects. These projects are itemized, with information as to amount, type, and status, in table 1, which is attached. On the same date there were 29 allotments outstanding for gas projects, an itemized list of which is given in table 2, attached. As of the same date, there were 48 allotments for Federal electric proj-
578 ects and 2 for Federal gas projects. These are itemized in table 3, attached.

It is difficult to estimate the exact amount which has been allotted for electric and gas purposes, as many of the projects combine other features as well. An estimate has been made, however, of the cost of that part of all projects which may be properly described as electric power. In the federal projects this amount is $151,240,482; in the non-Federal the amount is $76,091,446. A corresponding estimate of that part of the allotments which have been made for gas projects amounts to $49,500 in the Federal projects and $2,088,216 in the non-Federal projects.

There has been no litigation on the Federal projects and none on the non-Federal gas projects. Obstructive litigation has been confined almost entirely to electric generating plants or distribution systems in places where these facilities were not publicly owned at the time of the allotment. Of 93 allotments outstanding for such new publicly owned electric facilities, 56 are now in litigation. Still

THE WHITE HOUSE
WASHINGTON

June 29, 1934.

My dear Mr. Secretary:

The Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (Public No. 412, 73d Cong.), appropriated the lump sum of $899,675,000, to remain available until June 30, 1935, to be allocated by the President for carrying out the purposes of certain acts of Congress, including the National Industrial Recovery Act.

It is requested that the sum of $~~400~~401,000,000, which is hereby allocated to the Administrator of Public Works from said appropriation of $899,675,000, be set up on the books of the Treasury under the appropriation title "Public Works Administration, 1935".

Sincerely yours,

Franklin D. Roosevelt

The Honorable,

The Secretary of the Treasury.

others have been delayed by litigation and the projects have either been given up by the applicants or, in a few cases, construction was allowed to proceed after favorable court decisions. Almost all the suits have been brought by private power companies who fear the competition which such publicly owned facilities will provide either directly or as a comparative standard. In most cases, such litigation attacks the constitutionality of the Federal statutes, and restraining orders have been issued by the Federal courts, prohibiting the Public Works Administration from making payments to the applicants, in 36 different cases.

One case, in which the Public Works Administrator is included as a party, has been tried on the evidence and argued before the upper court *(Duke Power Co., et al v. Greenwood County, et al, and Harold L Ickes)*. This case
579 was decided in favor of the Government, the circuit court holding that the power company had no right to sue and that, even if it did, the act was constitutional and was not being violated. The injunctions against the 36 projects, however, still remain in force and the employment of thousands of people is thus impeded."

There is attached a list of all the projects, giving their location, amount of allotment, and the other information requested.

The plaintiffs introduced and there was received in evidence as Plaintiffs' Exhibit 262 Senate Document 193, 74th Congress, 2d session, which was a report of the Administrator of PWA, in response to a Senate Resolution, giving a list of all non-federal projects which have been approved or not finally disapproved but for which no allocations of funds have been made by PWA as of March 31, 1936. (The document is attached to and made a part of this statement of evidence.)

Whereupon the Plaintiffs read the deposition of
580 **John H. Carlock**, who having first been solemnly sworn to tell the truth, the whole truth and nothing but the truth in answer to such questions as were propounded to him he testified as follows:

Direct examination.

My name is John H. Carlock and Ardmore, Oklahoma, is my home. I am in the banking, lumber and farming busi-

ness. I was appointed as a member of the State Advisory Committee or Board of Public Works Administration in July 1933 and was subsequently elected Chairman of that Board. I remained Chairman of the Board until our work was terminated early in 1934, about March 1934. Our general instructions from Washington with regard to obtaining applications of municipalities for public works loans and grants were to advise the public what the Public Works Administration was. We received no applications until the engineer was appointed. It was a dual set-up, a Board and an engineer. Our first work was to inform the public what the Public Works program was. Of course, we had a great many inquiries at the office and we had public meetings, perhaps a half a dozen. I remember one we had in Clinton in western Oklahoma one at McAlester, one at Clarence, and I believe one at Norman. I won't say how many we had. I attended most of these meetings but not all. We also gave out interviews to the press and otherwise, anyone who came in we advised them. The Municipal League helped us to get the publicity for these meetings. The relation between our Public Works Administration Board and the Municipal League was no more than with any other group of citizens. We were trying to assemble people so that we might disseminate what we knew about the Public Works. Mr. Lybrand was a member of that committee and the third member was Mr. Higginbotham. Mr. Higginbotham was connected with the Municipal League as its Secretary. He attended the meetings which

I attended. I remember at Clinton that we had a
581 large attendance to come, some 40 or 50 mayors of western Oklahoma. Two or three of us addressed the whole mass of people and talked from a patriotic standpoint that it was their duty to take advantage of everything that would help bring us out of the depression. Then we divided into groups. I think at Clinton we asked that the teachers and superintendents go into a certain room and we asked that all engineers representing different cities go into another room. As I recall, we had three or four separate meetings and designated someone to explain to each group. As I recall there were more people at that meeting interested in country schools than anything else. The other meetings I attended the same general procedure was followed.

Whereupon the plaintiffs read the deposition of **R. A. Thompson,** who having first solemnly sworn to tell the truth, the whole truth and nothing but the truth in answer to such questions as were propounded to him, testified as follows:

Direct examination.

My name is R. A. Thompson. I am 65 years old and live at Dallas, Texas. I became Federal Emergency Administration of Public Works State Engineer for Texas about August 15, 1933. I was appointed by Mr. Ickes, Administrator of Public Works.

I was continuously engaged as State Engineer of Public Works Administration from August 15, 1933, until October 1, 1934. I was the first one employed in Texas as State Engineer of Public Works Administration. Immediately after I became State Engineer of Public Works Administration I began to receive applications for loans and grants, and continued to receive applications until some time in March 1934. Generally no field investigation of these applications was made. No written report on these applications was made by the State Advisory Board of Public Works Administration. They just made a memorandum approving certain reports as being admissible for
582 investigation and examination. This memorandum, which was simply a list of applications, was referred to me by the Advisory Board of Public Works Administration with the suggestion that engineering reports thereon be prepared. Generally, however, there was no engineering report made with respect to a project that was not approved by the Board. But in case the project was approved by the Board, which approval was signified by its inclusion in the list of applications transmitted to me by the Board, then I made an engineering investigation and report on the particular project. That system was in effect up to the time that the Board was in session, which was March first, 1934, up to which time applications were examined and reports made upon the recommendation of the State Advisory Board. After the Advisory Board went out of office, the State Engineer proceeded on his own motion and under instructions from the Administrator to complete reports on all applications. I recall that while I was

State Engineer, I received an application from the city of Plainview, Texas, for a loan and grant for the purpose of building and financing a municipal electric project. That application was received State Office on October 4, 1933 and carried Application No. 417. I did not make or cause to be made by our engineering examiner an engineering investigation and report with respect to that project.

"Q Why not?

"Mr. Scott. To which we object, if your Honor please, for the reason that the witness has testified that he did not make any report and it calls for a conclusion of the witness.

"The Court. I will sustain the objection.

* * * * * * * * * *

"Mr. Westwood. I note an exception."

The State Engineer of Public Works Administra-
583 tion made no report on the Plainview application up to March 1, 1934, at which time the Public Works Administration State Advisory Board was dissolved. Subsequent to March 1, 1934, under instructions from the Administrator, an examination was made of each application then remaining in the office and a memorandum made on each application, which included, among others, the Plainview application. This memorandum set forth the principal points of the application without any recommendation and was forwarded to the Administrator for further examination and report in the Washington office. I did not receive any information from the various agencies of the Federal Government with respect to the amounts of unskilled labor on the relief rolls and the amount of skilled labor on the relief rolls. I terminated my connection with Public Works Administration on October 1, 1934. Mr. Ickes wrote me that I did not seem to be in harmony with the Administration, indicating that I did not seem to be handling the job in accordance with his ideas and suggested that I terminate my service. I made a reply to his letter but did not receive any other letter from Mr. Ickes. I received a telegram accepting my resignation. I have the letter that I received from Mr. Ickes in my personal file and do not mind exhibiting it to you.

(Whereupon the letter was exhibited to the Commissioner and marked Plaintiffs' Exhibit No. 5)

The letter which I have identified is on the letterhead of the Federal Emergency Administration of Public Works, Washington, D. C., dated December 6, 1934, and is signed by Harold L. Ickes, Administrator. I am familiar with Mr. Ickes' signature and I am of the opinion that the signature on this letter is that of Mr. Ickes.

Whereupon this letter was received in evidence by the Commissioner as Plaintiffs' Exhibit No. 5, which read as follows:

584 "My dear Mr. Thompson:

"For sometime I have not been entirely satisfied with the way the Public Works business is handled in Texas and I feel that a change would be advantageous. I am not unaware of the difficult problems involved in handling the applications for a State as large as Texas but there have been unmistakable evidences of a lack of proper cooperation on your part with the divisions of inspections and investigations that do not make for good administration. Also, I have not been satisfied with my inability to obtain compliance with my instructions that all applications received, regardless of whether or not they were recommended for approval, should be examined and submitted to me.

"There are also strong grounds for believing that you have, as State Engineer, opposed applications for funds to construct municipal power plants.

"It is with regret that I have reached the conclusion that a change in the Texas Administration is necessary. Perhaps you would prefer to terminate your service by resignation, and in order to give you that opportunity I shall take no final action until you have had time to consider that step.

"Sincerely yours

/s/ HAROLD L. ICKES
"Administrator."

Just following the receipt of this letter I did not send in my resignation. I requested permission to come to Washington and explain the situation to him and to offer him my defense. He refused me this and so I wired him my resignation. I never had any difficulty with Mr. Ickes con-

cerning the making of these reports which the rules and instructions in Public Works Administration Bulletin No. 2 required. His letter was the first indication that I had ever received that he was not entirely satisfied. I had no
585 complaints nor comments from him prior to that time.

Cross-Examination.

My wife owns, and I also own, some preferred stock in Dallas Power and Light Company and Texas Power and Light Company. This stock was purchased prior to my employment with Public Works Administration.

Whereupon plaintiffs read the deposition of **Leo M. Ewing**, who having first solemnly sworn to tell the truth, the whole truth and nothing but the truth in answer to such questions as were propounded to him, testified as follows:

Direct examination.

My name is Leo M. Ewing and I live at Kirksville, Missouri. I have lived in Kirksville for 43 years and at present I am with the Right-of-Way Division of the Missouri State Highway Department. I served as mayor of Kirksville for 3 terms 1928 to 1934. I know Colonel Hugh Miller. I met Colonel Miller around the middle of December. He was State Public Works Engineer for Missouri. I met Colonel Miller around the middle of December 1933 at the Travellers Hotel in Kirksville, Missouri. Colonel Miller had called to promote bond issues and a meeting was held at the Travellers Hotel at which Colonel Miller spoke. He stated that he was the Public Works Administration Engineer of the State of Missouri representing the United States Government and promoting Public Works Administration work, and, he asked the citizens there at that meeting to wire their State Senator asking for the passage of certain bills relative to municipal light plants, especially Senate Bill No. 9, because if that bill was passed we would have an opportunity to vote a bond issue in Kirksville to build a municipal light plant. The Government would give us outright 30 percent of the cost and would loan the other 70 percent to the municipality at an interest rate of 4 percent. The city would not be obligated financially because

this money would be paid back from profits accruing from the operation of this plant. At that time he urged
586 us to wire and write to our Senator who was also Chairman of the Municipal Committee of the State Legislature. This committee had charge of these bills. He further stated that it was the wish of President Roosevelt that these bills pass and was also the wish of Governor Parks. He also mentioned the name of Mr. Ickes. Colonel Miller arrived about 2 o'clock in the afternoon and there were possibly 40 or 50 of us in the dining room at the time that he came in and spoke. He said that he was making a thousand mile campaign over the State urging the passage of these bills so that Missouri might get the benefit of this Public Works Administration money. He was there possibly an hour and a half or two hours and left immediately. He stated at that time that he was leaving for Trenton, Missouri.

Whereupon plaintiffs read the deposition of **Robert L. Sawyer**, who having sworn to tell the truth, the whole truth and nothing but the truth, in answer to questions propounded to him, testified as follows:

Direct examination.

My name is Robert L. Sawyer and I live at Warrensburg, Missouri. I lived in Trenton, Missouri, until February 1935, where I was editor of the "Republican Times'" a newspaper. That was the only daily newspaper in Trenton. I know Colonel Hugh Miller, State Public Works Administration Engineer. He came to Trenton, Missouri, in the early part of December, 1933, and made a speech at a meeting that was called there. He talked primarily about the passage of the revenue bond issue bill which was before the Legislature at that time. He urged the people present at the meeting to wire their State Senators and urge them to vote right on the revenue bond bill. He stated substantially that if they did not vote right on that bill, we would know what to do with them when election time came.
587 He spoke in regard to urging the municipality to get money from the Public Works Administration. I made notes of that meeting and subsequently as editor of the daily paper, I wrote an article from the notes concern-

ing it. The article was published in the paper. I wrote the article myself.

Whereupon plaintiffs read the deposition of **Albert C. Laun**, who being sworn to tell the truth, the whole truth and nothing but the truth in answer to questions propounded to him, testified as follows:

Direct examination.

My name is Albert C. Laun and I am Vice-President of the Union Electric Light and Power Company. I am a resident of St. Louis County, Missouri. I know Colonel Miller. I first met him in September, 1933, at the Missouri Hotel at Jefferson City, Missouri. At that time he was Engineer in Charge of Public Works Administration for the State of Missouri. I met him in September, 1933, at which time he told me his title and the work he was doing and he remained in Missouri until early in the Spring of 1935. I met Colonel Miller again in Jefferson City in November 1933. On this occasion a special session of the Missouri Legislature had been called by the Governor of Missouri. This session started sometime during October 1933. Early in the session Senate Bill No. 9 was introduced into the Senate. The bill in regular course of events was assigned to the Municipal Corporations Committee and that committee, in deciding what they should do with the bill, had called a hearing. The first hearing was devoted to parties who wished to appear in behalf of the passage of this bill, and at this meeting Colonel Miller appeared in behalf of the passage of the bill. Colonel Miller appeared before this committee and argued for the passage of the bill (Senate Bill No. 9) and in his argument stated that this
588 bill had been prepared by attorneys of the Public Works Administration in Washington and that he was co-author of the bill. He stated that there should be no disposition on the part of private utilities to fight the passage of this bill as it was the Government's purpose to give large sums of money to various municipalities in the State of Missouri which money would come in the form of grants or gifts, and would not have to be repaid by the municipalities. In addition, he stated, that the Government would loan additional large sums of money at low rates of interest which could be paid back to the Government

from the earnings of the power plants if Senate Bill No. 9 were passed, and, that if the power plants failed to make money, the cities would not have to pay anything back to the Government. He also said that this was not only an expression of his views but was instruction from President Roosevelt, the United States, and from Mr. Ickes. And that he spoke in full authority of Washington in fighting for the passage of this bill which had been prepared by the attorneys for the Public Works Administration in Washington. He stated that it was the Federal Government's purpose wherever possible to loan these sums of money and to give these grants of money so that power plants could be set up by the municipalities and used as yardsticks so that the people of Missouri could judge for themselves whether or not they were paying too much for electricity throughout the State. He went further and stated that the people of Missouri in many instances were overcharged for electricity and that this was the only way people could come into their own and judge for themselves the prices they should pay for electricity. I was present and heard Mr. Miller make these statements. Certain members of the committee said that the bill as written would allow the people of the municipality to vote as to whether or not they should bond themselves for the construction of a power plant and distribution system but the bill was so constructed that if a deficiency existed after they
589 started to build a plant and the people had voted on an actual question that the Board of Aldermen had the right to issue additional bonds without any limit. They could float as many bonds as they found necessary to complete the project, and Colonel Miller at that time stated that he was not sure that the bill was so constructed, but that if it was, the municipalities and governing bodies would certainly use discretion in issuing such additional bonds as they needed. Colonel Miller again appeared before this committee about the middle of November 1933, on which occasion the Senate Committee of Municipal Corporations had called a hearing so that people who were opposed to the passage of this bill could be heard. At this hearing, those people who were opposed to the passage of the bill were heard and after their statements, Colonel Miller jumped on the floor and asked that he be heard. The Chairman of the

Committee stated that those people who were in favor of the passage of the bill had been assigned one night on which to be heard and on this particular occasion those people who were opposed to the passage of the bill were being heard. Colonel Miller stated that this was gag rule on the part of the Senate committee and that he was going to take this question to the people. He stated that the Federal Administration in Washington was in favor of the passage of these bills and that the Public Works Administration was in favor of the passage of these bills. He said that Mr. Ickes was in favor of the passage of these bills and that the Senate committee had no right to block the passage of them and that if they dared to block the passage of them that he was going out to tell the people of Missouri that they should be beaten when they ran for office again. I heard Colonel Miller speak at Jefferson City in the latter part of December 1933 on the occasion of a meeting of certain people who favored municipal ownership of electric light and power companies in Missouri. They had called a meeting in Jefferson City and Colonel Miller ad-
590 dressed that meeting. I was present at the meeting and heard Colonel Miller say that he had just completed a trip through Missouri in which he had visited most of the towns of any size throughout the State and that he had advocated that all Senators who had opposed the passage of Senate Bills 7, 8, 9 and 10, should be beaten when they were up for re-election. He stated again that the Government was willing to give large sums of money and loan large additional sums of money at a low rate of interest to municipalities so that they could build municipal plants throughout Missouri which would serve as yardsticks in measuring the cost of electricity paid by consumers to private plants throughout the State. He pointed out that these bills, if passed, would not have increased the bonded indebtedness of the cities due to the fact that the bonds which are issued under these bills would not be styled as a debt of the cities, but would be paid for out of the earnings of the power plants. He stated that this would enable cities in Missouri which had reached the statutory limits of their indebtedness to float these additional bonds so that they could build power plants and pay for them out of earnings, if they had earnings, and if they did not have any earnings,

the cities had nothing to lose by the building of the power plants. He also stated that if the mayors of these towns and the people at this meeting had read the St. Louis Post Dispatch, the St. Louis Star and Times, and the St. Louis Globe Democrat, or most of the other papers throughout the State, that they were familiar with this thousand mile tour he had made through Missouri in which he had advocated that the members of the Missouri Senate who had voted against the passage of this bill should be beaten for re-election. He also stated that if Missouri did not take advantage of these loans for municipal power plants that the Government will have to loan this money in some other State and that the result would be that the amount of allotments of Public Works Administration funds to Mis-
591 souri would be much smaller than if these bills were passed. At that time he stated that he was the authorized agent of the Federal Government in Missouri and any statement made by him was a statement authorized from Washington by President Roosevelt, Mr. Ickes, and of other governing bodies that had anything to do with the loaning of Public Works Administration money. Those were not his exact words but the summing up of the meaning of his words. Colonel Miller stated that he had received a letter from Secretary Ickes and that in this letter, Mr. Ickes stated that if the Senate held up the passage of Senate Bills 7, 8, 9 and 10, that he would take the fight out to the people and the independent newspapers throughout Missouri and let them know that Missouri was not receiving its portion of Public Works Administration funds that they could receive if the Senate Bills 7, 8, 9 and 10 were passed.

The plaintiffs introduced and there was received
591A in evidence as plaintiffs' exhibits 263, 264 and 265, respectively, the following three letters:

"November 10th, 1933

Hon. Harold L. Ickes,
Administrator,
Through, Col. H. M. Waite,
Deputy Administrator,
Public Works Administration,
Washington, D. C.

Subject: Pending Legislation in Missouri.

1. The attention of the Administration is directed to legislation now pending before the Extra-Ordinary Session of the Missouri Legislature, which will have an important bearing upon the Public Works program in this state.

2. There are four bills authorizing Cities, Towns and Villages of less than 75,000 population to issue plant revenue bonds for the construction of municipal waterworks, gas plants, electric light plants and sewerage systems. These bills were urged upon Governor Park by the State Advisory Board and were made a part of his legislative program. However, it is alleged that the utility lobby, which is very strong, is likely to defeat some or all of these bills. If it is the policy of the Administration to urge action regarding such legislation it is respectfully requested that the Administration use its influence in this situaton. Governor Park belongs to the dominant party and his party is in complete control of both houses of the legislature, but it is likely to be split on these bills.

3. Another part of Governor Park's program urged on him by the State Advisory Board, is a proposition for a $15,000,000 bond issue to be used principally for the penal and eleemosynary institutions of the State. Opposition in regard to this bond issue has not yet crystallized but is undoubtedly strong.

591B

4. Those matters are brought to your attention, not only because they vitally affect the public works program in the State but because I considered it my duty to advise the administration at Washington regarding them.

HUGH MILLER
State Engineer, P.W.A."

November 18, 1933

"Col. Hugh Miller,
State Engineer, Public Works Administration,
219 Buder Building, 705 Market St.,
St. Louis, Missouri.

Dear Col. Miller:

I have your letter of November 10 regarding pending legislation in Missouri.

I appreciate very much your keeping the Administration informed in regard to these matters. I feel, however, that it is entirely a question of local policy, to be decided by the citizens of Missouri acting through their authorized representatives, as to whether they do or do not want to pass a given piece of legislation.

I think that the extent to which the State Advisory Board should go is to inform the authorities that such and such acts would expedite the Public Works program in Missouri, that such and such a bill would simplify the legal situation, and the like. Beyond that, I feel that it is up to the people of Missouri to decide how far they want to participate in the Public Works program. I do not think that it is any part of the duty of the State Advisory Board to force Federal funds upon unwilling borrowers.

Sincerely yours,

(sgd) HAROLD L. ICKES, *Administrator.*"

591C "November 20, 1933

Hon. Harold L. Ickes,
Federal Emergency Administrator of Public Works,
Interior Building,
Washington, D. C.

Dear Mr. Ickes,

I wish to thank you for your letter of November 18 in reply to my previous letter regarding pending legislation in this State.

I appreciate your frank statement regarding the position that the State Advisory Board and the State Engineer should take regarding local legislation. It has been our policy to follow a similar course in this State.

A situation has arisen here, however, which is somewhat unusual, inasmuch as about thirty million dollars worth of Public Works is dependent upon action by the Legislature, a special session of which was called by the Governor for the purpose of expediting the Public Works program among other things. The Governor is campaigning for this program but the legislation has been held up chiefly by the Senate which is overwhelmingly of the same party as the Governor and the National Administration. Owing to the limitation of time, we have been obliged to accept applications contingent upon the passage of this legislation and some of these applications have already been forwarded to Washington, others are being held here, and still others are in the course of preparation or are being held back awaiting the action of the Legislature. You will appreciate, I think, my position in the matter as I am charged with the duty of having these applications forwarded quickly and all that I am asking is that legislation be passed or defeated in accordance with the wishes of the people of the State of Missouri.

The Kansas City Star recently said that the score
591D at Jefferson City is 0 to 0; Senate 0, House of Representatives 0. This reflects quite accurately the legislative situation after more than a month of special session.

Thanking you again for your kindness in taking the time to explain to me the attitude of the Administration in this matter.

Very truly yours,

(sgd) HUGH MILLER,
State Engineer, P. W. A."

The plaintiffs introduced and there was received
592 in evidence as Plaintiffs' Exhibit 266 a letter sent by Harold L. Ickes, Administrator, to Colonel Hugh Miller, State PWA Engineer for Missouri, as follows:

"November 28, 1933

Colonel Hugh Miller,
State Engineer,
Public Works Administration,
219 Buder Building,
St. Louis, Missouri.

My dear Colonel Miller:

Referring to your letter of November 20 regarding the pending legislation in Missouri, I am advised that such legislation falls into two categories. The first is confined to a proposal for a $15,000,000 bond issue for use primarily for construction of penal and eleemosynary institutions. This is entirely a question of local policy with which I feel the Public Works Administration should not concern itself.

The second part of the legislative program embraces enabling legislation authorizing municipalities with a population of less than 75,000 to issue revenue bonds for the construction of municipally owned utilities. I understand that cities with a population in excess of 75,000 already possess such power.

I am informed that several of the bills have been killed in Committee within the last day or two and that the opposition to these bills was confined almost solely to a utility lobby. While it is the policy of this Administration not to interfere with local questions, I feel that the people of Missouri should be advised that the Public Works Administration is ready and willing to aid in financing the construction of municipally owned utilities which meet with its engineering, legal, and financial requirements. The existing status of the law in Missouri renders it difficult, if not impossible, to assist municipalities desiring to construct such facilities.

Perhaps, the utility lobby is succeeding because
593 the Metropolitan Press has not advised the electorate of the situation. I understand that there are liberal newspapers in your larger cities which are sympathetic with the municipalities in their struggles against the utilities. The trouble probably is that these newspapers are not carrying on an active campaign for the legislation because the larger municipalities already possess the power to issue revenue bonds. Perhaps, if the cause of the legislative impasse is brought to the attention of the electorate,

the legislators will free themselves from the influence of the utility lobby. While it is not the function of the Public Works Administration or of the State Advisory Boards to force funds upon unwilling borrowers, I feel that we owe a duty to the people, to explain where the real responsibility rests and to advise them that the applications of municipalities desiring to construct utilities will receive every consideration from the Public Works Administration if their legislative representatives will enact the legislation necessary to enable such municipalities to issue revenue bonds.

The Washington Correspondents of the Missouri newspapers will be advised by me why under the existing state of law it is impossible to allocate any funds to the smaller Missouri municipalities for the construction of municipally owned utilities except where the municipality is in a position to issue general obligation bonds.

Sincerely yours,

(Signed) HAROLD L. ICKES
Administrator."

The plaintiffs introduced and there was received
594 in evidence as Plaintiffs' Exhibit 267 a letter sent by Harold L. Ickes, Administrator, to Colonel Hugh Miller, State PWA Engineer for Missouri, as follows:

"FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS
WASHINGTON

October 28, 1933.

My dear Mr. Miller:

I have your letter of October 26, and I thank you for your full and clear explanation with reference to applications for municipal electric light plants.

Undoubtedly, hearings ought to be held, but it seems to me that it could be taken for granted that power interests will oppose any municipal electric light project, and after one such protest has been heard all have been heard. My view is that hearings ought to be granted for the purpose of establishing whether the municipality itself desires a project. If a project is generally desirable, engineeringly practicable and legally sound, then it ought to be for-

warded with approval to Washington, notwithstanding certain interested opposition, although the existence of such opposition should be noted as a part of the recommendation made.

Sincerely yours,

-(SGD) HAROLD L. ICKES,
Administrator.

Mr. Hugh Miller,
State Engineer, Federal Emergency
Administration of Public Works,
219 Buder Bldg., 705 Market St.
St. Louis, Missouri."

595 The plaintiffs marked for identification as Plaintiffs' Exhibit 268 a handbill, which was as follows:

"STATEMENT FROM THE SELECTMEN

To the Residents of Brandon,
In Regard to

THE TOWN OWNED
LIGHT AND POWER PLANT

From our canvas of the Townspeople for subscribers to Town Electric Service now going on, we have found that there are certain misunderstandings regarding the project which we feel should be *cleared up by a statement from the Selectmen.*

1. Our project *has been approved,* not 'TENTATIVELY' as stated in the last issue of the Brandon Union, but as stated in the following telegram received by the Engineer for the Town of Brandon:

'YOUR PROJECT APPROVED BY PRESIDENT TWENTY FIFTH FURTHER DETAILS WILL FOLLOW BY LETTER'

H. J. LOCKWOOD ACTING STATE DIRECTOR 808A Sep 27

2. There is to be *no bonding of the Town* to finance this Power Plant. The total of $163,635.00 for construction is furnished by the United States Government. Of this total, $73,635.00 is an *outright grant, not to be repaid.* The Balance of $90,000.00 is a loan to be repaid *solely from the net*

profits of the Plant, and not out of any Tax collections or any other money of the Town.

3. *In no way can the Taxes of the Town be increased on account of this project.*

We wish to thank the people for the splendid response they are now making, and we urge all to get behind us to help make this Town project a success.

SELECTMEN OF TOWN OF BRANDON,
F. L. SMITH, P. L. BULRUS, R. W. BRESEE."

596 The plaintiffs then offered to prove "by the witness Edward Lawrence, who it is agreed need not be called into the court room for the purpose of this offer, that handbills like that marked for identification as Plaintiffs' Exhibit 268 were circulated by the town selectmen among the citizens of the Town of Brandon, Vermont, immediately preceding a vote by the citizens of that municipality on the question of issuing revenue bonds to be sold to the Public Works Administration for the purpose of financing a municipally-owned generating and distributing electricity system as a non-Federal Public Works project. It is agreed that neither the PWA nor anyone having any association with the PWA had any connection with the issuance of these handbills." The handbill was then exhibited to the Court and offered in evidence in connection with the foregoing offer of proof. The offer of proof was made to show the natural effect of an offer by the defendants to finance a municipally owned electricity plant by purchase of revenue bonds and a grant of 30% or 45% of the cost of construction.

The defendants objected to the evidence offered "as being utterly irrelevant and immaterial to any of the issues of this case". The objection was sustained and the plaintiffs were allowed an exception.

The plaintiffs then for the same purpose made the following offer of proof:

"By the depositions of Fred L. Hiss, of W. W. Harvey, of E. F. Bulmahn, of John R. Hoffman, and of R. R. Rowell, and by witnesses Cyrus Field and D. E. Byerley, who it is agreed need not be called into the court room for the purpose of this offer, the plaintiffs offer to prove that similar

handbills or newspaper advertisements were circulated under similar conditions among the citizens of the municipalities of Sandusky, Ohio, Jacksonville, Illinois, Delta, Colorado, California, Missouri, Eldon, Iowa, Devils Lake, North Dakota, and Morenci Michigan."

597 The defendants made the same objection as that preceding, which was sustained, and the plaintiffs were allowed an exception.

The plaintiffs marked for identification as Plaintiffs' Exhibit 269 a full page newspaper advertisement inserted in a weekly newspaper of Plainview, Texas, by the Council of that City, and signed by the members of the Council. The advertisement, exhibited to the Court, contained among other things the following passage:

"THE FREE GIFT OF FORTY-FIVE THOUSAND DOLLARS

The City must at some time provide wells and pumps and make the other improvements proposed to be made from the BOND issue. By doing the work now the City will receive from the U. S. Government $45,000.00 as a free gift. Is it good business to lose that offered gift and later pay the full cost of the improvements?

The State Engineer for the Public Works has extended the time to hold this election; but has made it positively clear that unless the bonds are carried at this election, the allotment, both the loan and the proposed gift of $45,000.00 will be cancelled and forever lost to the City."

The plaintiffs then made the following offer of proof:

"By the deposition of Herbert Dysart the plaintiffs offer to prove that the City Council of Plainview, Texas, which is one of the cities involved in the suit, had circulated in a newspaper of general circulation in the City of Plainview, Texas, the advertisement marked as Plaintiffs' Exhibit No. 269, immediately prior to an election to determine whether that city should acquire wells and pumping facilities for its waterworks, such acquisition to be financed by PWA grant of 45 per cent of the cost of construction and the purchase by PWA of the city's revenue bonds to cover the remaining cost."

598 The defendants objected to the evidence offered as being irrelevant. The objection was sustained and the plaintiffs were allowed an exception.

The plaintiffs marked for identification as Plaintiffs' Exhibit 270 and offered in evidence a handbill circulated in the Town of Russellville, Alabama, by the City Council and signed by the City Council. The circulation of the handbill occurred immediately preceding a vote by the citizens of the Town on the question of approving the electricity project which is one of those involved in this suit. The handbill states, in part:

"FACTS ABOUT THE COMING ELECTION

SHALL THE PEOPLE OF RUSSELLVILLE TURN DOWN THIS GIGANTIC OPPORTUNITY TO SECURE CHEAP POWER FROM MUSCLE SHOALS

On Monday, an Election will be held to determine whether the City shall take advantage of President Roosevelt's Muscle Shoals Program to develop the Tennessee Valley, and to decide whether our City shall secure the advantages of Cheap Electricity the same as our neighboring cities.

WHAT WILL IT COST THE PEOPLE OF RUSSELLVILLE TO OWN AND AN ELECTRICAL DISTRIBUTION SYSTEM, BUYING POWER FROM TVA?

Answer: It will cost them nothing. The government lends them money and assumes any risk which may be attached to the loan. The Government's security lies in the income from the sale of electricity, which will be more than ample to pay interest on the bonds and set aside a sinking fund to retire the bonds in 20 years thus, in 20 years the people will come into ownership of the Distribution System without putting up a cent of money.

HOW WILL THIS LOAN EFFECT THE CREDIT OF THE CITY?

Answer: It will improve it materially. The City will be able to make a gross operating profit from a distribution system after paying all operating expenses, interest and sinking fund. This operating profit will be greatly in access of the taxes and license now payed the City by the PUBLIC UTILITY.

599

HOW WILL THE CITY PAY FOR AN ELECTRICAL DISTRIBUTION SYSTEM?

By issuing income Bonds which will pledge the income from the Distribution System to the payment of interest and sinking fund. These bonds WILL NOT be a general obligation of City, and hence will not add one penny to the City's General Debt therefore will not effect Taxes in any way.

WHAT BENEFITS WILL THE AVERAGE CITIZEN OF RUSSELLVILLE SECURE FROM A MUNICIPAL ELECTRICAL DISTRIBUTION SYSTEM?

Answer: They will secure a very great reduction in the cost of Electric Power, which will go far to improve living conditions in the Home. Under the proposed rates Electricity will be so cheap it can be used for Cooking, Hot Water Heating, Refrigeration, Ironing, Washing and other Household appliances. In fact, the purpose of the President's program is to give a demonstration of the facts that Electricity can be sold in the Household at rates so low that no House Holder can afford to do without it."

The offer was made for the same purpose as the foregoing offers, the defendants objected on the ground that the evidence was irrelevant to the issues in the case, the objection was sustained, and an exception was allowed the plaintiffs.

600 The plaintiffs here rested their case.

Whereupon the case for the defendants proceeded
601 as follows:

Thomas A. Martin called as a witness on behalf of
602 the defendants and being duly sworn testified as follows:

I am the Mayor of Iowa City and have been since April 1, 1935. I was City Attorney for two years prior to that. I am familiar with the origin of the movement in Iowa City for a municipal light plant. October 11, 1932, there was a franchise election held in Iowa City, in which the Iowa City Light and Power Company, who then held a franchise, sought a renewal of the franchise. The election resulted in turning down the franchise by a rather substantial majority, about three to one, I believe. During that campaign for an electric franchise there was some discussion generated about what to do in looking ahead to electric service in Iowa City because the then existing franchise was to ex-

pire. January 13, 1934. When the franchise was turned down so decisively this discussion increased considerably.

The next city election after the franchise election
603 was in March, 1933. The witness was thereupon asked what, if anything, was put in the campaign in that election pertaining to a municipal light plant. Plaintiffs objected to the question as immaterial, irrelevant, not tending to prove any issue in the case and as calling for the conclusion and opinion of the witness as to what the issues were in a municipal election having nothing to do, itself, with franchises or municipal plants. The Court overruled the objection to which plaintiffs duly noted an exception. The witness thereupon answered that he recalled a questionnaire being placed before all the candidates for city council in the course of that campaign by the League of Woman Voters, and that a resume of their answers was published in the local newspapers just prior to the primary election. The election on the construction of a municipal plant was April 18, 1934. The Council elected in March, 1933, withdrew their application for PWA support in October 1934.

The next election after that was in March, 1935. I was a candidate for Mayor in that election. The only issue of any importance in that campaign was the question of the construction or establishment of a municipal electric light plant and distribution system in accordance with the authorization of the special election which carried on April 17, 1934.

Question. With reference to the candidates, who were pledged to the erection of the municipal plant, what was the result of the election?

Objected to as immaterial and irrelevant, objection overruled and exception noted.

Answer: There were two candidates for the city council, one in favor of proceeding with the establishment of the municipal plant and distribution system and one opposed; in each of the five wards; and in the two aldermen-at-large election there were two candidates pledged to the establishment of a municipal electric light plant and distribution system and two candidates opposed.

The result of the election was the election of five ward aldermen and two aldermen-at-large, all of whom were

pledged in the campaign to the establishment of the
604 municipal electric light plant and distribution system. All of the municipal ownership candidates were elected.

It is stipulated that the Simmer Law enacted in 1931 permitted municipalities under certain conditions to establish municipal light plants, and to pay for them out of
605 the earnings of the plant, by a method differing from that which now exists, but still limited to earnings.

I prepared the ballot for the election on the municipal ownership question in Iowa City and it was prepared under the Simmer Law.

The Public Works Administration did not ask or solicit or suggest that the City of Iowa City build a municipal electric light plant so far as I know.

On Cross Examination the witness testified as follows:

The election which occurred in March, 1935, was a regular, biennial municipal election at which candidates for the various city officers, including mayor and council, were to be elected, and at that election there was not any official submission of any question regarding municipal ownership. If there were any other issues and questions and other things which may have motivated some of the voters in that election aside from the question of construction of a plant, I don't know of them. I cannot say whether each candidate appealed in the same way to all of the voters. I suppose that I, like anyone else, had persons who would not have voted for me in that office in spite of any issue of municipal ownership and others who would have voted for me regardless of that question. I have never seen an election in which as much weight was placed on one question as that election. Approximately 8,000 ballots are cast as a rule at a municipal election in Iowa City.

606 Defendants offered Defendants' Exhibit No. 1, for identification, being a letter from the Tennessee Valley Authority by David E. Lilienthal, Director and General Counsel, addressed to Honorable J. A. Nelson, Mayor, Decatur, Alabama, and dated December 12, 1934.

Plaintiffs objected to the receiving of Defendants' Exhibit No. 1 for identification in evidence on the ground that it went to an entirely collateral issue, that it was a self-

serving declaration on the part of the Tennessee Valley Authority, and that it was entirely irrelevant to the issue involved in the case. Plaintiffs objection was overruled and exception noted and Defendants' Exhibit No. 1 for identification was received in evidence as Defendants' Exhibit No. 1, and reads as follows:

607 TENNESSEE VALLEY AUTHORITY

Knoxville, Tennessee

December 12, 1934

Board of Directors,
Arthur E. Morgan, Chairman,
Harcourt A. Morgan
David E. Lilienthal

Hon. J. A. Nelson, Mayor,
Decatur, Alabama.

My dear Mr. Mayor:

Over three weeks ago the Tennessee Valley Authority tendered to The Albama Power Company the sum of money agreed upon for the purchase and sale of electric distribution properties in North Alabama, including those within your community. The Company failed to convey the property. While the contract to purchase is still in effect for the time being, the Authority is bound to inform you that it no longer has an assurance that the Company will convey, as disclosed in the memorandum of facts attached to this letter.

Under these circumstances and in view of the fact that your community may be substantially prejudiced by further delay, the Authority does not feel justified in requesting your city longer to defer your original plans for the acquisition of an electric distribution system, plans which you agreed to forego last August in order that the Authority might endeavor to acquire those properties for you by purchase.

The Authority has not indicated it will reject these properties if they are tendered. If there should be a change in circumstances we shall immediately inform you. In the meantime we regard the possibility of the tender of these properties so remote as no longer to justify us in interfer-

ence with your plans in the interest of avoiding the
608 construction of additional distribution facilities.

Very truly yours,

TENNESSEE VALLEY AUTHORITY
By David E. Lilienthal
Director and General Counsel

Enclosure

609 Defendants offered Defendants' Exhibit No. 2 for identification which was the memorandum attached to Defendants Exhibit No. 1. Plaintiffs objected to the receiving of Defendants' Exhibit No. 2 for identification in evidence on the ground that it went to an entirely collateral issue, that it was a self-serving declaration on the part of the Tennessee Valley Authority, and that it was entirely irrelevant to the issue involved in the case. Plaintiffs' objection was overruled and exception noted and Defendants' Exhibit No. 2 for identification was received in evidence as Defendants' Exhibit No. 2, and reads as follows:

610 MEMORANDUM OF FACTS

1. *Policy of TVA to Avoid Competition*

In carrying out its policy to sell the surplus power produced by the Government properties at Wilson Dam rather than to permit it to be wasted, the Directors of the Tennessee Valley Authority, in August of 1933, adopted a policy of disposing of such surplus without competition with privately-owned utilities. In order to carry this surplus power to agencies desiring to purchase it, the Board adopted a policy of buying existing transmission lines at fair prices, rather than build duplicating transmission lines.

Pursuant to the same policy of avoiding competition, TVA has urged municipalities which have voted to acquire their own distribution systems to do so by purchase of existing facilities rather than the construction of competing facilities.

2. *The Contract of January 4 between TVA and Alabama Power Company*

On January 4, 1934, a contract was entererd into between TVA on one hand and Alabama Power Company and cer-

tain other subsidiaries of the Commonwealth and Southern Corporation on the other. Under this contract, among other things, TVA agreed to buy and Alabama Power Company to sell certain transmission lines in North Alabama extending from Wilson Dam to certain communities in Northern Alabama. These communities had theretofore voted to acquire their own distribution systems and had entered into contracts with the Tennessee Valley Authority for a bulk supply of energy. They had also voted bonds and initiated arrangements to borrow funds with which to construct new plants.

3. *Efforts of Communities to Buy Distribution Facilities from Alabama Power Company*

It was contemplated by the contract of January 4 that communities in North Alabama would seek to purchase their distribution facilities from the Alabama Power Company. Following the contract, negotiations were had
611 between the Company and the cities. These negotiations proved futile, inasmuch as the company's representatives not only asked excessive prices for the properties, but insisted that the payment must be in cash, although the communities could only pay for the properties in revenue bonds.

4. *TVA Urges Cities Not to Build Competing Plants*

These negotiations for purchase having failed, the North Alabama communities pressed their plans for the construction of new plants. Allotments for loans covering most of the communities were made by the Federal Emergency Administration of Public Works. At a time when the construction of new plants was imminent, TVA negotiated for an option from the Alabama Power Company for the purchase of the distribution facilities in North Alabama. After weeks of negotiations a price of one million dollars was agreed upon. This price was reached after a study of the properties and their value, in the course of which TVA engineers found the physical condition of the properties in North Alabama, particularly in the Tri-Cities where the Company's franchises had expired, to be very poor. The figure of one million dollars represented the full value which could reasonably be assigned to these properties in their then condition.

TVA then conferred with the officials of these communities and urged them to forego their plans for construction of a competing plant. The plan was for the Alabama Power Company to convey the purchased properties to TVA, with a later re-conveyance of the properties to the separate communities. A plan for the regional operation of the properties was worked out. This plan, under which competition with the Alabama Power Company would have been avoided, was adopted by resolution of the respective governing bodies of each of the communities involved. Thereupon being assured that this plan for the municipal acquisition of these properties through the TVA was satisfactory to the respective municipalities, TVA, on August 9th,
612 entered into the option contract for the purchase of these distribution facilities. A large sum was then set aside by the Authority to place the properties in good condition.

5. *The Proceedings Before the Alabama Public Service Commission and in the Federal Court*

Under the laws of Alabama, the approval of the Public Service Commission was necessary before the Alabama Power Company could convey these distribution properties to TVA. Application was made to the Public Service Commission for such approval on August 9, 1934.

Under an agreement with the Commission that the Authority's participation in the proceedings should not be construed as conferring any jurisdiction by the Commission over the Authority, the Authority was represented by counsel at the extensive hearings on this application, and made an elaborate presentation of evidence on the issue of public interest. In fact, though the application was that of the Company, the Auhority was compelled to assume and did assume virtually the entire burden of proof before the Commission.

On the 12th day of September, 1934, certain preferred stockholders of the Alabama Power Company filed an action in the Circuit Court for Limestone County seeking to enjoin, among other things, the transfer of the distribution properties, and joining as defendants these North Alabama communities. This case was removed to the Federal District Court, while the application for transfer was still

pending before the Public Service Commission. The plaintiffs in this action sought a temporary injunction restraining the transfer. Judge Grubb denied the motion for temporary injunction. No order in any wise restraining the conveyance of these properties to TVA has ever been issued.

613 6. *The Action of the Chemical Bank and Trust Company, of New York, Trustee Under the Alabama Power Company Mortgage*

Three months after the Alabama Power Company had agreed to sell the distribution properties to the communities, through TVA, the Chemical Bank and Trust Co., of New York, the trustees under a power company bond issue, indicated that it would require an "independent appraisal" of the properties to be conveyed to determine whether the interests of the bondholders were being protected in the transaction. This action was taken just before the close of the extended hearings before the Alabama Public Service Commission, and therefore immediately prior to the first opportunity for a conveyance to TVA pursuant to the contract. The trustee was promptly advised as to litigation initiated by preferred stockholders on September 12, 1934, in which the adequacy of the purchase price was challenged. However, it was not until November 7, that action in this respect was taken.

A few days after November 7, the Power Company employed the engineering firm of Ford, Bacon and Davis to conduct the appraisal requested by the Chemical Bank. Upon an inquiry as to the record of this firm we have been compelled to conclude that there was little likelihood that the purchase of these properties could be consummated. The firm of Ford, Bacon and Davis has been frequently employed by public utility companies involved in rate proceedings in which a high valuation must be established in order to sustain existing rate structures. At the present time this firm is engaged in supporting the existing rates of the Public Service Company of New Jersey before the New Jersey Public Service Commission. It was employed in this proceeding by Mr. Thomas N. McCarter, President of the Public Service Company of New Jersey and also President of the Edison Electric Institute. At the time of

the employment of this firm by the Alabama Power
614 Company, Mr. McCarter had taken steps whereby the organized utility industry was to make a combined attack upon the activities of the Tennessee Valley Authority and to have the Act of Congress declared unconstitutional. One of the trustees of the Edison Electric Institute is President of Commonwealth and Southern Corporation, which controls the Alabama Power Company. We have, then, the Alabama Power Company agreeing to cooperate in consummating the sale of its properties, and at the same time assisting in the effort to have the Tennessee Valley Authority's powers declared invalid.

Whatever the motive, we fear that the effect of the employment of Ford, Bacon and Davis in this situation is to serve notice that indefinite delay and eventual obstruction of the transaction is to be expected, and that if these communities in North Alabama propose to furnish themselves with electricity, through community plants, they can only buy those plants on the basis of the excessive appraisals of professional utility valuators.

7. Request by Authority for Performance of the Contract

On November 24th the Alabama Public Service Commission unconditionally approved the transfer of the distribution properties to the Tennessee Valley Authority. On that day, after having given appropriate notice, General Solicitor James Lawrence Fly, of the Tennessee Valley Authority, communicated with the attorney for the Chemical Bank, indicating that he was authorized to receive a conveyance of the property and to tender the condition, and that he was in a position to do so. The bank gave word that it would not release the properties at this time. Shortly thereafter Mr. Fly conferred with counsel representing the Alabama Power Company, and a representative of the Guaranty Trust Company, which is also a trustee under the mortgages of the Alabama Power Company. The Guaranty Trust Company indicated it was ready to release at once. Mr.
Fly stated that the Authority was then ready to pay
615 the full consideration and to close the transaction and that he was properly authorized to do so. Counsel for the Alabama Power Company stated that the company was not in a position to convey and no conveyance was made.

Conclusion

The Tennessee Valley Authority has spent a whole year endeavoring to protect the investors in the Alabama Power Company from the losses which would be incurred in competition between community electric plants and the plants of the Alabama Power Company. In this effort the Authority has had the full cooperation of the communities involved. The elected representatives of those communities and the people themselves have exhibited patience and a fine sense of fairness. Those efforts to prevent competition have failed under the circumstances above related.

Under the contract between Alabama Power Company and Tennessee Valley Authority with respect to distribution properties, the Authority may exercise this option at any time prior to February 12, 1935. While the option is therefore still effective the likelihood that the Alabama Power Company will convey this property within the option period seems to us to be so remote that the Authority does not feel justified in longer urging the communities to delay their plans in reliance upon eventual performance of this contract.

TENNESSEE VALLEY AUTHORITY

616 Whereupon

Julian B. Adler

was called as a witness for and on behalf of the defendants and having been first duly sworn was examined and testified as follows:

Direct Examination

I live in Birmingham, Alabama, and I am a member of the firm of Lide & Adler, consulting engineers. On behalf of the cities of Sheffield and Tuscumbia I conducted negotiations with Alabama Power Company with regard to the acquisition by those cities of the distribution systems of Alabama Power Company located within those cities. The history of those negotiations is as follows: After the cities voted to go into the municipal electric business, which was for Sheffield in April 1933, and for Tuscumbia, a month or two later, my partner and I suggested to the governing bodies of the cities that they attempt to purchase the existing utility systems and the officials of those cities addressed

a letter to the Alabama Power Company and asked them for a price. Subsequent to that there were a great many conferences and a certain exchange of letters. I attended most of these conferences on behalf of the cities, and my partner and I acted in an advisory capacity. Those conferences were with the officers of Alabama Power Company, one or two vice-presidents almost always being present. At Sheffield, the power company offered to sell its distribution system for approximately $164,000 and at Tuscumbia for approximately $104,000. The city of Sheffield offered the power company $126,000 and the city of Tuscumbia offered a little over $80,000. My partner and I suggested to the city of Sheffield the top price at we would be willing to recommend and stated that we thought that price was more than the physical property was worth. That was also true of the offer of $80,000 for Tuscumbia. We told the
617 cities that these prices were what we thought was the full value of the properties and took into consideration that they would get a going business. But it was made under the rather extraordinary circumstances that there was no franchise existing in those towns so that they were only buying the physical property. Of course the fact that the city could get a grant from Public Works Administration if it constructed its own plant was before us, but we told the cities that we thought those prices took into account the full physical value of the properties they could use in the existing facilities. In case of Sheffield that was not all of the utility property. In the case of Tuscumbia it was almost all of the utility property.

"Q. Well, when you named the figure of that top price, was that the price you would have recommended regardless of whether or not the city could have gotten a grant from the Public Works Administration? A. Yes.

"Mr. Turner. We object to that.

"The Court. I overrule the objection; I think that it fair.

"Mr. Turner. We except, if your Honor please.

"The Court. Very well

"By Mr. Frank:

"Q. There is in evidence a letter from your firm to the Alabama Power Company dated October 5, 1933, it being a part of Plaintiffs' Exhibit No. 1, page 18, in which you

stated to the Alabama Power Company, among other things the following:

"'The cities feel that since you have no franchise, they will be entitled to a 30 percent grant from the Government on a loan with which to construct a new system. They also feel that the depreciated existing systems cannot be worth more than the cost of new systems which with the Government grant could not exceed 70 percent of their con-
618 struction cost. They are therefore unwilling to pay for the usable portions of your distribution systems, as set forth in your tender, and as concurred in by the undersigned, more than 70 percent of the depreciated value as appraised by Messrs. J. E. Sirrine and Company. They will, however, pay that much.'

* * * * * * *

"Q. Have you had the letter read? A. Yes, sir.

"Q. What did you mean by that language which is different from what you testified? A. Well, that letter was predicated—

"Mr. Turner. If your Honor please, may I state that the letter is perfectly unambiguous.

"The Court. Then let it go."

I think I can reconcile the statement I made on the witness stand with the statement made in the letter just read. That letter was written in the course of a large interchange of correspondence between the power company and ourselves—written without any knowledge of the city officials who, of course, had the last say. We accepted for the purpose of negotiation the report of J. E. Sirrine. We accepted the Sirrine valuation for the purpose of negotiating only. And we did not think the valuation was correct, for we thought it was too high. Based on that valuation, we endeavored to reconcile by a series of sentences and to the base price which we had figured was a fair price for the city to pay.

Whereupon the Defendants stated that they had no further questions for the witness and there being no cross-examination by plaintiffs, the witness was excused.

619 **Winfield Holbrook**

was called as a witness for and on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

I live in Plainview, Texas. I am manager of the Texas Land & Development Company. I was graduated from the engineering school of the University of Colorado in 1904. Thereafter I was engaged in the engineering profession actively until I became manager of the Texas Land & Development Company in 1919, first on railroad location and construction, afterwards on irrigation work. I am manager of a corporation, that is looking after irrigated land. We operated the land through tenants, and are using 78 water wells for irrigating land. I am personally in charge of the maintenance of these wells. I am familiar with the cost of installation of a well in the vicinity of Plainview, and with the type of well that would be needed by the City of Plainview to furnish water for the city water system. You understand that I was not prepared to give you an opinion how many wells the City of Plainview needs in order to supply the city with water. I should say that they should have three wells—two wells to do the pumping, and one well in reserve. These wells are the same type that are under my personal supervision. I would estimate the cost of drilling the well, $560. Cost of the casing, $430. The cost of a pump, to pump the water from the ground and pump it against a head of 140 feet, or into a sand pipe—either one—would be $1,792. For seating pump and concrete base, $160. Developing well, $210. Motor, $1,111. Conduit and labor connecting motor, $75. Switchboard and starter, $410. Pump house and derrick, $252. A total of $5,000 for each well. The cost of the three wells would be $15,000. For this the city will have a water supply and will only need to provide electricity to pump the water in the mains.

Cross Examination

620 I am a graduate engineer and have practiced engineering. I have not practiced in Texas directly. My work is based on engineering knowledge, but I am not practicing professionally; I am working for a corporation. Between 1904 and 1919, I practiced professionally. In New York, Colorado, Idaho, Utah, New Mexico, Colorado again, Kansas and Texas. At first it was largely railroad engineering that I was in. Then I went into irrigation and

engineering. In northern Colorado I had charge of construction of ditch work and reservoirs; in central Colorado, of a large reservoir; in Pueblo, of the construction of an irrigation system. In Montezuma County, I was engineer for the County Irrigation District. In Kansas, I was engineer for the Garden City Sugar and Lime Company. All this work was in connection with water obtained from dams, except in Garden City, Kansas, about 200 miles from Plainview. We were drilling wells there. I was the supervisor. They had contractors to do it.

I am familiar in a general way with the requirements of Plainview, Texas for water. I have often been to the pumps. I would say their maximum draught there is something over 2,000,000 gallons per day but less than 3,000,000 gallons. I estimate that 3,000,000 gallons a day could be obtained from two wells. Everywhere close around the city, water is available, without any danger of not getting a well. The place where they expect to put the wells is owned by the City, and was bought some years ago. However, the neighboring land is all similar, within two or three miles. One of my company's wells was built right within a few hundred feet of the Texas Utilities plant, and was used by them temporarily at one time, to pump the water from. My estimate is for a well with an 18-inch casing for 120 feet, and 12 inches for the remainder. I had in mind 12 gauge casing—that refers to the thickness of it; and the type of casing is the type commonly used there, of welded
621 casing, and then perforated after you get below a certain depth. There is no item in my estimate for connecting the wells with the water system in Plainview.

622 Whereupon **Herbert Dysart** was called as a witness on behalf of the defendants, and, being first duly sworn testified as follows:

Direct Examination

I live in Plainview, Texas, am now and have for the past 11 years been a member of the City Council in Plainview. Some 7 or 8 years ago the Council entered into negotiations with the Texas Utility Company to secure a reduction in light and power rates in Plainview. These negotiations continued over a period of some two or three years, and

nothing was accomplished. At that time the officials of the Texas Utilities Company advised the City Council that the rates in Plainview were the same rates that were being charged in all towns served by the South Plains Division of the Texas Utilities Company, which includes the town of Lubbock. Our investigation over this period of years convinced the City Council that this was not a fact. On July 20, 1931, the Council of the City of Plainview, Texas, adopted a resolution favoring the erection of a municipal light and power plant. On November 15, 1932, the Council adopted an ordinance to the same effect and on the same date authorized the Mayor and the City Secretary to enter into a contract with Montgomery & Ward, Engineers, of Wichita Falls, Texas. On January 17, 1933, the Council adopted a resolution instructing the Mayor to write to Judge I. R. Kelso to ask him for a proposition for the sale of their Plainview properties, or rather their Plainview plant, to the City. That communication was never answered.

Q. Judge Kelso is president of the Texas Utilities Company? A. Judge Kelso was president of the Texas Utilities Company at that time.

Q. You may proceed, Mr. Dysart. A. On February 21, 1933, the Council adopted Ordinance No. 369. This
622A ordinance called for an election to approve revenue bonds in the amount of $450,000.

Q. You have referred to Ordinance No. 369. I show you a document which has been marked as Defendants' Exhibit 3, and will ask you if it is a true copy of the Ordinance No. 369, referred to by you. A. Yes, sir; that is a true copy of Ordinance No. 369.

Q. That is the resolution of the City Council with reference to the election on a municipal plant? A. Yes.

Mr. Sher. The defendants now offer in evidence Defendants' Exhibit 3, being Ordinance Number 369 of the City Council of Plainview.

Mr. Acheson. We have no objection.

There was received in evidence Defendants' Exhibit No. 3, being Ordinance 369 of the City of Plainview.

Mr. Scott. Reading from the exhibit:

And just let the record show that the ordinance was read into the record and copied into this record in toto at this point:

"Plainview, Texas, Feb. 21, 1933.

"On this day the City Council met in regular session with the following members and officers present, to wit: Mayor R. P. Smyth; Aldermen: D. Bowman, F. J. Hurlbut and E. M. Osborne; J. L. Gallaway, City Secretary; P. H. Bryan, City Tax Collector; and C. S. Williams, City Attorney, when the following proceedings were had.

"Upon motion of Alderman Dysart, seconded by Alderman Hurlbut, an ordinance ordering an election to determine whether or not revenue bonds should be issued for the purpose of providing the City with an electric
622B light and power plant, was adopted by Unanimous vote:

"Be It Ordained by the City Council of the City of Plainview:

"Section 1

"That an election be held on the 4th day of April, 1933, throughout the City of Plainview, Texas, at which election the following proposition shall be submitted; Shall the City Council of the City of Plainview, Texas, be authorized to issue revenue bonds in a sum not to exceed $450,000 . . . said bonds and/or the proceeds from any sales thereof to be used for the purpose of providing the City of Plainview with and electric light and power plant and electric distribution system."

On April 4, 1933, a muncipal election was held to determine whether the City Council should be authorized to issue revenue bonds for the purpose of erecting a municipal power plant. The result of this election was 438 in favor of the issuance of such bonds, and 100 against such issuance.

On May 8, 1933, the Council adopted a resolution
623 authorizing the Mayor to contact the engineers and have them prepare the necessary plans and specifications for the erection and construction of the plant. This was done, and on August 7, 1933, the City made application to the Public Works Administration for a loan and grant with which to finance the plant, provided we deemed that advisable. We thought we could finance the project through the sale of the bonds, but we though perhaps we might get a lower interest rate by getting the money from the PWA.

We had talked with various contractors and bond men and people who deal in those kinds of securities. We advertised for bids for the construction of the plant on September 18, 1933. In December 1933 we entered into a contract with C. S. Lambie & Company to erect a plant. Mr. Lambie and his associates were to build a plant in accordance with the specifications and were to take the bonds in payment for the plant. The Community Power & Light Company, that claimed to hold a majority of the bonds of the Texas Utilities Company, sued out a writ of injunction through the various courts, and we were finally enjoined. I believe that was in Federal court. The case was not appealed. We then prosecuted our PWA application with all possible diligence. Our loan and grant was approved in August, 1935. We made arrangements to let the contract, and this suit was filed, and we were stopped. At the present time the City owns the water distribution system except the wells. The wells belong to the Texas Utilities Company. The City pays the Texas Utilities Company for furnishing the wells and pumping the water, all under one contract. I am familiar with the contract. (A copy of said contract was offered in evidence as defendants' Exhibit 5.) We entered into a contract on February 1, 1936, with the PWA for the loan and grant of $100,000 for the purpose of installing wells and making improvements and betterments to the present system by way of enlarging the lines, and so forth, and for an additional standpipe. Prior to February 10, 1936, PWA made an offer to the City of Plainview for the $100,-
624 000 loan and grant. It was sometime in 1935, but I just don't recall when. It was pending for several months after the application was made.

The Council of the City of Plainview has given consideration to the question of water supply in the event anything should happen to this loan and grant of Federal funds. We have gone into it very thoroughly at various times to determine our ability to finance the wells and such equipment as might be necessary. It is all held up pending the final disposition of that case, because we were also enjoined there by the Texas Utilities Company. The City owns the ground on which to put the wells, a 5-acre tract in the west part of the town, on the highest point around there. That was acquired some years ago. The assessed valuation of

the City of Plainview is just a few thousand under 6 million dollars at this time. The bonded debt of the City is approximately $550,000. I know what it will cost to install wells for the water works. The basis of my knowledge is on information given to us by owners of wells and various people who are engaged in the sinking of irrigation wells and water wells in that territory. I have had expert advice on the cost. I have had discussions with the owners of wells and with persons engaged in the business of installing wells as to the cost of installation. I have talked particularly with Jim Cook and Artie Baker, each of whom has installed at least 50 irrigation wells in the immediate vicinity of Plainview. I have also talked with numerous farmers, including Jim Heard and Bebs McLaughlin, who are neighbors of mine, and various other land owners who have installed irrigation wells. My own opinion is that the cost will not exceed $12,000. I am familiar with the charter of the City of Plainview, adopted April 6, 1920. The City has power to engage in the distribution and sale of electrical energy, and also to own and operate its own municipal water system. No officer or employee of the Public Works Administration suggested to the City of Plainview that it should file application for a loan and grant for a
625 municipal power plant, so far as I know.

Cross Examination

The City Council determined to give notice that it would issue bonds for an electric light and power plant on October 16, 1932, and gave notice on November 20, 1932. When the City Council made application to PWA for a loan and grant, the grant was the motivating reason—one of them. We received formal notice about April 23, 1935, from PWA that our application and been approved.

The Texas Utilities Company in Plainview have three wells of their own, and the City owns one well, as I understand it. I have never known the exact status of that particular well. The wells are all in a small area and usually each well has just what we call a pump house around it. Then, of course, it has the necessary pump installed, and it is connected to an electric motor to pump the water. That is about the sum of the equipment. They are usually drilled some 50 feet to the first strata of water, and then they go on

down to 175 feet and strike several more strata. They start in about 14 inches in diameter, I believe—12 or 14 inches—and they are perhaps 8 or 10 inches at the bottom, as I understand it. They have hundreds of irrigation wells in the immediate vicinity of Plainview, and usually anyone owning a well goes down and gets an experienced driller and lets a contract for it, and he guarantees to furnish so much water at a certain price. The average well pumps 800 to 1100 gallons per minute and costs about $2,100 equipped. That is a well for farm use. Perhaps it would cost considerably more to furnish the electric motor, and so forth, that we would use in Plainview. As to whether we are planning to have three wells about the size necessary for farm use in order to supply the whole city, would depend upon our needs. We might get along with two wells. We might deem it advisable to have two larger wells instead of three smaller ones. The figures of cost which I have given
626 is not a figure based upon wells designed for farm use. We could drill three farm wells for $6,000, but I said $12,000. In my statement I had in mind that we would perhaps have three wells. My figure includes all of the machinery in connection with the city waterworks.

In November 1934, I came to Washington with the City Attorney. Mr. Rau was one of the persons with whom we talked. He was represented to us as a representative of PWA. When Mr. Williams and I were planning to return to Plainview, we came back to Mr. Rau's office to get such additional information as we could. We visited a little while, because we were preparing to leave. I said, "Mr. Rau, tell us, as nearly as you can, what our situation is and when we may expect some reply." He replied that in all probability the Texas Utilities Company would be given an opportunity to reduce their rate. I said, "Well, Mr. Rau, do you mean by that that if they reduce their rate down equal to the rate proposed in our application the loan and grant will not be made?" He said, "If the Utilities Company reduces their rate down to the point where your plant would not be self-liquidating, I should judge your loan will not be granted." We left him there.

Redirect Examination

By my statement that the grant offered by the Public Works Administration was a motivating factor in causing the City to file its application with the PWA, I meant that we had already determined to build a plant, Mr. Sher,
627 and we thought we knew how we could finance it all right; but if we could save some money, we just decided we would make the application with PWA.

Recross Examination

I presume you might say we had not taken legal action looking toward building the electric plant until we took action to issue the bonds, although the Council had definitely decided to build the plant if it could find any way to finance it. We had an election at which we were authorized, if we thought best, to issue some bonds. Then in October we took the action to issue the bonds. At that time we knew that such grants were available.

George F. Harley was called as a witness on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct Examination

I am a civil engineer. I was graduated from George Washington University in 1905, with the degree of bachelor of science in civil engineering. My engineering experience has been: Four years in the Geological Survey and Reclamation Service out west. Then three years I was with J. G. White & Company on development of power plants in central Georgia. After that, in 1911, I was employed by Stone & Webster as district engineer in charge of construction in western and southwest Georgia for 20 years. After that time I was employed in the Supervising Architect's division of the Treasury, supervising the construction of post offices in Savannah, Brunswick, and other smaller jobs in the territory around Savannah. That was in 1932 and 1933. In 1933 I was employed by the PWA as engineer, and since that time I have been in that service. During that period practically all of my work has had to do with power developments, coming through the PWA office, and most of my work has been in connection with applications for loans

for municipal electric plants. I have had actual ex-
628 perience in the construction of hydroelectric generating plants and steam plants. I am familiar with the costs of labor and material that go into the construction of an electric light plant and with the costs of the operation and maintenance of electric plants after they are constructed. I have studied the application and accompanying data submitted by the City of Plainview, Texas, to the Public Works Administration for a loan and grant for the construction of a municipal electric project and have prepared during the past week a schedule showing the dollar revenue of the proposed municipal plant over the loan period.

(Whereupon Statement entitled "Plainview, Texas, Summary of Operating Results, Proposed Municipal Plant", was received in evidence as Defendants' Exhibit No. 7, reading as follows:

Plainview, Texas Summary of Operating Results, Proposed Municipal Plant.

(4 per cent sinking fund, amounting to the cost of the plant at end of its estimated useful life, 25 years).

	Gross Revenue	*Total Expense*	*Surplus*
1937	$89,000	$69,200	$19,800
1938	90,800	74,400	16,400
1939	92,600	79,300	13,300
1940	94,400	79,100	15,300
1941	96,300	78,900	17,400
1942	98,300	78,700	19,600
1943	100,200	83,500	16,700
1944	102,200	83,200	19,000
1945	104,300	82,800	21,500
1946	106,400	82,500	23,900
1947	108,500	87,200	21,300
1948	110,700	86,700	24,000
1949	112,900	86,300	26,600
1950	115,100	88,800	26,300
	$1,421,700	$1,140,600	
Accumulated Surplus			$281,100

I arrived at the figure of $89,000 as estimated gross revenue for 1937 by taking the statistics of operation of the Texas Utilities Company in the town of Plainview that were submitted with the application for the loan, analyzing them and estimating that the division of business be-
629 tween the two competing organizations would be as follows: Municipal lighting, 100 percent to the proposed municipal plant; Municipal power, for pumping, 100 percent to the proposed municipal plant; Residential light and power—that is, residential service—I estimated that 60 percent of that would go to the municipal plant. For the other two items, commercial lighting and industrial power, I used 50 percent, the same figure used in the plaintiffs' exhibit. By that calculation I arrive at a [redacted] which includes all municipal light and power, and a weighted average of 54 percent of the private load. I have estimated that the city will procure 54 percent of the private business, and the private company 46 percent of the private business. That, then, would give me the result of the operation of the plant if it had been in operation in the year 1933. I then assume that there will be an annual increase of two percent in the gross revenues of the business in Plainview, the division between the two being as I have indicated. I estimate an increase of two percent per annum in the total business, because I lack information from the city. We could not get all of it we wanted, because the data were a year or two old, but in my study of it I used these figures as a basis. According to the Federal statistics in the United States, the average annual increase during the last 16 years in the production of electricity is six percent; in the State of Texas, for 16 years, nine percent. In the United States, during the past two years, eight percent; and in Texas, six percent. Coming down to Plainview, and taking the figures that have been submitted in this case by the plaintiff here, I find that the average increase during the past two years in private sales in the city of Plainview is five percent. I assumed that the city has not yet entirely got out from under the influence of the depression, and that there will be a tendency to reduction of rates by increase in per-customer consumption; and so I summed that up in a
630 two-percent estimate of the average annual increase in revenues over the 14-year loan period. Then,

starting back with 1935, I used that figure to get the 1937 estimate of gross revenues for the proposed municipal plant, and get $89,000 for the first year of operation.

Plaintiffs' Exhibit No. 72 shows an average annual increase of slightly over one per cent over the life of the loan. I have estimated that the increase will be slightly over two per cent. I have used Plaintiffs' Exhibit No. 72 as a basis, except that I assigned the $11,364 for pumping water to the city instead of to the utility, and four per cent more of the private load to the city. Those two differences make up the difference between the first year's gross as shown in Exhibit 72, and my first year's gross of $89,000. There is a difference of four per cent on the total of private sales, or $5,000. The pumping load is approximately $12,000. That makes the difference of $17,000. I have prepared an estimate of the cost of operation of the proposed municipal plant, based upon the gross revenues shown in Defendants' Exhibit No. 7.

Whereupon, statement entitled "Plainview, Texas, Estimate of Operating Results, Proposed Municipal Plant," was marked Defendants' Exhibit No. 8 and received in evidence, reading as follows:

Plainview, Texas

Estimate of Operating Results, Proposed Municipal Plant

	Operating Year			
	Base	Fourth	Ninth	Fourteenth
Gross Revenue	$86,200	$94,400	$104,300	$115,100
Expense				
General Superintendence	1,500	1,500	1,500	1,500
Clerical help	1,600	1,600	1,600	1,600
Line Foreman	1,500	1,500	1,500	1,500
Linemen	1,800	1,800	1,800	1,800
Chief Engineer	1,800	1,800	1,800	1,800
Watch Engineers	3,600	3,600	3,600	3,600
Plant Maintenance, Material & Labor	3,500	3,820	4,430	5,140
Line Maintenance, Material & Labor	1,000	1,090	1,270	1,470
Relief Operator	600	600	600	600
Miscellaneous Labor	400	400	400	400
Commercial Expense	1,000	1,000	1,000	1,000
Service Truck, Operation & Maintenance	700	700	700	700
Fuel Oil	11,300	12,850	14,890	17,250
Lubricating Oil	1,130	1,280	1,490	1,730
Miscellaneous Plant Expense	500	550	630	740
Insurance	2,080	2,080	2,080	2,080

	Base	Operating Year Fourth	Ninth.	Fourteenth
Depreciation (4% Sinking Fund)	$9,600	$9,600	$9,600	$9,600
Uncollectible accounts	2,000	2,000	2,000	2,000
Total	$45,610	$47,770	$50,890	$54,510
Debt Service Requirement		31,320	31,920	34,320
Total Expense		79,090	82,810	88,830
Surplus		$15,310	$21,490	$26,270

Comparing the figures contained in Defendants' Exhibit No. 8, with the figures shown in Plaintiffs' Exhibit No. 70: The first item is General Superintendence, $1,500. I used the same figure. Clerical help, $2,400. I used $1,600. This is not a new organization. It is an addition to the city's present organization, and $1,600, providing two clerks, will amply care for the additional clerical work. The next item is Solicitor, $1,200. Solicitor of new business. In this Exhibit No. 70 of the Plaintiffs, if you look at the bottom of the sheet, it shows the plant operating at an annual deficit in excess of $20,000 throughout. This solicitor starts in at $1,200 and his pay is steadily increased until, at the end of the 14-years, when the bookkeeping deficit has risen to $330,000, his pay has been doubled. Throughout this whole table everybody gets a raise. Whenever there is a figure shown in here, the employees get higher pay than they did the year before, and it is rather notable that the difference between the total deficit in the first and the total deficit in the 14th year just balances the raise in wages throughout that period.

632 I have allowed nothing in my estimate for solicitors, because I think that while that would be a perfectly legitimate charge for a utility going into a town to develop business, it is not a legitimate charge against a municipal plant where the business is already there and it is merely a matter of getting its share of the business. Besides that, the city government and all the city local organizations and every taxpayer would be interested in the success of this plan, and I think the combined efforts of those would far exceed the service requirement of a single solicitor at $1,200 or $2,400 a year. For that reason I leave him out. Besides that, I have not found any other costs of operation which carry any such large figure as that for municipal solicitor.

Line Foreman, $1,500. I use the same figure, but I do not increase the cost for Line Foreman over the 14-year period. I leave it flat throughout that time.

Linemen, $2,400, that provides for two linemen at $1,200. I have cut that to $1,800, one $1,000 lineman, and an $800 ground man—in other words, three men to operate the distribution system, which is entirely adequate and, summing up all these things, compares favorably with the total cost of operation in other places. Chief Engineer, $1,800. I use the same figure. Three Watch Engineers, $3,600. I use the same figure, but likewise I leave that pay at that rate throughout the 14-year period.

Plant Maintenance, Material and Labor, $5,100 the first year, increasing to $6,620 in the 14th year. I used $3,500, or two dollars per kilowatt of installed machinery, or $3,000 for the three units, plus $500 for the balance of the station, making $3,500, where the Plaintiffs' figure is $5,100. That figure of the Plaintiffs amounts to $3.32 per kilowatt of installed machinery. My figure is $2.28. The record of
633 two plants I have, which I believe is unbiased, shows 70 cents. Then, figured on a per kilowatt-hour basis, the cost on the Plaintiffs' figure is .26 of a cent per kilowatt hour. Mine is .18; and the record of eleven plants is .10. Eleven plants that I studied in connection with preparing this data are taken from the records of the Wisconsin State Public Service Commission.

Line Maintenance, Material and Labor, $1,500. I cut that to $1,000. All the line maintenance is done by the regular linemen. There would be no additional charge except possibly a book entry on that point. I am allowing $400.00 there for light renewals of the lighting system, and $600.00 for miscellaneous material that might be required in the maintenance of the line.

The next item which I have inserted, which is not in the Plaintiffs' list is a relief operator, part time, $600, and miscellaneous labor $400.00. As I see it, these three watch engineers, on an eight hour shift, would have to work seven days in the week unless there was somebody to relieve them, and so I am allowing that much time for relief of those men for a day off each week, and whenever they have a vacation.

Commercial Expense, $2,550. My figure is $1,000. Going back to the detail of that, there are in Exhibit 63 these

items: commercial expense, printing, postage, and office supplies, $300.00; publicity and advertising, $750.00; miscellaneous expenses, $1,500. I eliminated the miscellaneous expenses, $1,500. I do not know what it is. It might be $15,000.00 or $15.00. I do not know of any reason for it, so I left it out.

The next one is Service Truck, $1,000.00. I cut that to $700.00, because the depreciation of the truck is included in another table, another item of expense, and I have had a great deal of experience in the cost of operating trucks, and I make that on my own experience entirely.

634 With respect to fuel oil, the Plaintiffs' figure is $10,710.00. I used $11,300.00, because my estimate calls for a larger output of current. I used the same figure for cost of fuel oil and the cost of other oil—lubricating oil—that are used in this table.

The next one is Miscellaneous Plant Expense, $500.00. I use that, but carry it flat, throughout the table.

The next is Insurance, $2,080. This insurance item goes up to $2,250 in the fourteenth year, when the plant has been depreciated, according to this table, about 70 per cent. There seems to be hardly any reason for an increase there. I was not able to get the information needed as to the Texas rates, and I used $2,080 throughout in mine.

The next depreciation, $19,000. I used $9,600. This depreciation item of $19,000 represents 27 per cent of the gross revenues of the plant in its first year of operation. My figure of $9,600 is the amount which, set up as a sinking fund, will amount to $400,000 at the end of my estimate of the useful life of the plant. As to my estimate of the useful life of the plant, there is a wide difference between my figures and the Plaintiffs' in that respect. Plaintiffs' Exhibit 64 figures the $19,000 depreciation annually on the basis of an estimated life of the various divisions of the plant property. They start out with an estimated life of the buildings as 50 years. I agree to that figure. The next item is oil engines and auxiliaries. Your figure is 15 years; mine is 21 years. For electric plant equipment, your figure is 20 years, mine 25 years. For poles and fixtures, your figure is 18 years, mine, 25 years. For overhead conductors, your figure is 20 years; my figure is 47 years. For transformers, your figure is 20 years; mine is 25 years.

There are several items down there with respect to
635 which I was unable to find any unbiased data, and so I accepted them as they are in your exhibit, from "Services" down to "autos and trucks", the last item. My computed weighted average life of the whole plant is 25 years. In 25 years $9,600, as a sinking fund at four percent, would amount to the total first cost of the plant.

As a basis for those figures as to the life of the vari-
636 ous structures, I have an Interstate Commerce Commission allowance for wire which allows for the life of wire 100 years, as against 20 years in the Plaintiffs' figures and 47 years in mine, but my figures are practically taken bodily from the Wisconsin Public Service Commission's report on depreciation, because I have found them the most widely quoted and I believe them to be the fairest of the State commissions that I know anything about. According to my figures, $9,600, set aside on a sinking fund basis, will repay the entire cost of the plant, including the amount that the city receives as a grant from the Government. The last item on my list is uncollectible accounts, according to plaintiffs' figures, $4,850, rising to $5,920 at the end of the loan period. I was unable to find enough reliable information. My own experience, in my own town was that the uncollectible accounts were very materially below one per cent. This figure represents almost exactly 7 per cent throughout the period. I used $2,000 flat, throughout the period. In my opinion that is an ample figure. Defendants' Exhibit 8 also contains figures for the fourth, the ninth, and the fourteenth year of operation which were obtained in substantially the same manner as the figures for the base year. The total figures shown on Defendants' Exhibit 7 were arrived at by the method just described. The increase in revenue shown for each year is arrived at by taking a two per cent increase in business. I have also prepared a bond and interest table for the Plainview loan which is substantially identical with Plaintiffs' Exhibit 66. My opinion, as shown by Defendants' Exhibit 7 is that the proposed plant will be able to pay the costs of operation and maintenance, set aside a reasonable sum for depreciation each year, pay principal and interest on the bonds when due, and leave a surplus besides.

637 *Cross Examination*

In Defendants' Exhibit 8 the base is the year 1935. I have included in the estimate of revenue an item of some $12,000. for the cost of electricity used in pumping water. I got the figure of $12,000. from the Plaintiffs' Exhibit No. 62, which shows a total for water of $11,364. I increased that over the loan period by 2 per cent per annum, although my average over the loan period is a little over $12,000. The figure which I used in 1935 is $15,753, which I got from one of your exhibits. That is the figure shown in the base year on Exhibit 8. No, I did not understand that that figure from Plaintiffs' Exhibit 62 was the cost of water to the city. I understand that that is the amount that the City paid for the pumping of the water. I believe I had read that the plaintiff Texas Utilities Company owned the wells and sold all of the water used by the city to Plainview and, as well, furnished the current to pump it, but I did not consider it in preparing these figures.

If it be a fact that the figure in Plaintiffs' Exhibit 62, $11,364, shown beside the heading "Total for Water," includes not merely the cost of pumping water, but also includes the cost of all water used by the City of Plainview and its inhabitatns, Defendants' Exhibit 7 is in error to that extent.

I am connected with the Engineering Division of the PWA asigned to power projects. I worked on the application of the City of Plainview in connection with a revised or supplemental report. I never prepared any estimate of operating revenues of Plainview before the one about which I have testified here. I wrote a supplemental report to the original PWA engineers' report on Plainview, but did not include an estimate on the operating revenues of the company. It was based on the other estimate. This is the only operating estimate I ever made. I have included

638 nothing in any of the exhibits offered here today to reflect any costs of amortization or operating expenses for wells. That would have nothing to do with my estimate. I would not allow a dollar for it.

1933 was the last year for which I have any classification of the services rendered by the Company. In arriving at the assumed division of business between the proposed municipal plant and the private utility I applied certain

factors derived from the data which I had for 1933 to get my percentages. I then took the estimate of probable revenue for 1935, shown in Plaintiffs' Exhibit 62 and applied my percentages to that figure. There is nothing on Plaintiffs' Exhibit 62 which gave me the split between the municipal water pumping revenue and the residential, commercial, and industrial revenue. I computed the distribution on the basis of the 1933 figures, which I have, which show not only the gross revenue from each classification of customers but the total sales in kilowatt hours. I estimated that there would be no change in the proportion of revenue attributable to the various classifications of customers.

Those proportions were taken from Plainview's application for a loan and grant. I have no way of knowing that they are absolutely correct. I asked the Company for figures and they were declined. I have read somewhere that certain decreases in rates were put into effect between 1933 and 1935. That would affect the ratio between various classes of consumers. That might affect the dollar ratio between various classes of consumers, but I have no reason to know it would. My ratio was based on dollars and on kilowatt hours. The rates, which I applied to the kilowatt hours for the purpose of obtaining the total revenue for 1935, were the average at the consumer's meter. The average cost not based on the rate scale but the average cost at the consumer's meter, as shown in these tables that I used, that came with the application.

639 I have no information as to the number of customers in the City of Plainview. I used the kilowatt-hour basis and the revenue, and that shows an average cost of over 4.7 cents for the whole load in the year 1933. That is verified by figures that I secured from the Federal Power Commission, reports sent in by the Texas Utilities on the Plains Division, which show an average cost in 1932 of 5.1 cents; in 1933, 4.9 cents; and in 1934, 4.8 cents for the whole load on that division based on those reports. I did not know that there had been several rate reductions during that period. I did assume 5 per cent. I assumed that 5 per cent on the basis of the difference between the total gross in 1934 and the total gross in 1935, which appeared to be $151,695 for 1934 and $145,718 for 1935. I just allowed that 5 per cent; I can't support it. They are gross revenues

in Plainview. That is a reduction in gross; I do not know whether it is a reduction in rate or not. In my Exhibit 7 I have taken a flat change between 1933, when the gross was $133,000 approximately, and jumped to 1935, where it is $145,000. The difference between those two is 10.57 percent. My figures reflect the trend exactly as I did find the facts for those two years, because the gross difference between the two years shows a change of $133,000 in the first year, 1933, to $145,000 in 1935, an average increase of 5 percent per annum. The fact that there is a rise and fall in between there, does not affect the mean figures per annum which I have mentioned. Taking the years 1934 and 1935, my estimate does not exactly run counter to the trend for those two years. I assume there was a decrease in rate, because there was a decrease of 5 percent. That was the latest data I had.

In Defendants' Exhibit 7, I did not take into account at all possible decreases in rates over the 14 year period. The average rates I have used here decrease from 4.4 to approximately 4 cents mean over the period of 14 years.
640 That is because of a change in the amount of consumption per customer. That is the way I assumed it. I did not have enough information to go into it in detail, and I assumed a 3 percent increase in the gross consumption of current and a 2 percent increase in the gross revenues. That is taking care of a gradual decrease in the rate due to the consumption per consumer rising and the rate getting into the higher brackets.

I did not have the number of customers, so I could not go into the average consumption per customer. All I have done is to take the gross figure, computed as, described, for 1935 and increased that 2 percent per year.

I referred to some statistics on increase in generation of electric current. Those increases are all based on kilowatt hours, and do not reflect anything about the increase in earnings or indicate whether there was any increase in earnings.

My basis for my division of the residential business, 60 percent to the municipal plant and 40 percent to the private utility, is my own experience and observation and study of many applications to the PWA for proposed loans and grants and many reports of municipalities. The applica-

tions to the PWA include the protest of the utility which generally covers all that anybody could think of as objectionable in the project.

641 I arrived at that in this way: Ordinarily I would say that where the public was not so much in favor of a municipal plant, the 50-50 division that is used in these plaintiffs' exhibits would be a fair proportion. In this case the evidence seems to me to warrant a larger assignment to the—I believed a larger proportion would go to the municipal plant, because 81 percent of the voters in the election to determine whether they would have it or not voted in favor of the plant, and on that basis I estimated 60 percent of those voters would take the municipal current.

My first item in expense, on Defendants' Exhibit 8, is general superintendence, $1,500. I assumed that the City would want about a $3,000 or a $3,600 man and that his time would be distributed between the various city business and that this plant would get $1,500 of his time. I considered that that would be the city manager or a person in a position somewhat similar to that. He would exercise the superintendence over the City's business, including this waterworks, the sewers, and so forth. I assumed that he would spend no more time on the municipal electric plant in the fourteenth year, 1950, than he would in the first year. If the utility pulled up stakes and moved out, then I would say that there would be an additional cost for supervision and for labor all down the line; but an increase of 2 percent per annum would not require an appreciable increase. I think in the beginning they would have more because of the supervision and labor and everything, than they would in the later period of those fourteen years, for the reason that they are starting out with a green organization, and I am assuming that that organization would function more efficiently as time goes on. My own experience is that there would not be any addition at all. I am sure that a good man can be secured at that rate at any time in those 14 years.

642 The item "linemen, $2,400." on Plaintiffs' Exhibit No 70, I have reduced to $1,800, on Defendants' Exhibit No. 8. I think I stated that they would have, as a force to operate this line, one foreman, one lineman, one ground man—three men. And my lineman and ground man I esti-

mated at $1,800, respectively, the foreman holding the same pay as you have here, $1,500. That difference makes the difference between that. I did not make any investigation of the rates of pay for linemen in Plainview. I do not know as a fact that the going rate for linemen is $8 a day in West Texas.

My item of plant maintenance, material, and labor, which is $3,500, on Defendants' Exhibit 8, is based on a cost of $2 per kilowatt hour of machinery installed in that plant, plus $500 for the balance of the plant, exclusive of the generating units. That makes a total of $3500, there being 1500 kilowatts of generating units installed—an average per kilowatt of $2. And I assumed an increase in those items as the plant grows older because there will probably be greatly higher maintenance than in the earlier years. I started with $2.38 per kilowatt for maintenance, and I increased that over the period, just as a matter of being sure there was ample money there to take care of the plant—largely on the theory that the plant's maintenance would increase as the plant grows older.

I accepted the plaintiffs' figure for insurance for the first year, although it seemed about 20 or 30 percent higher than the figure that I had for other sections of the country. And I just assumed that that might be true, due to the greater danger from tornadoes in that section than in the section where I had what I considered reliable information. So I considered that that covered fire insurance on the power station, and public liability, and pay roll insurance, and

643 everything that would normally be included in an insurance like that, in the operating of this plant. In making my computation of the cost of operating expenses per kilowatt hour, delivered at the meter, on the basis of the plaintiffs' figures, I took five hundred thousand kilowatt hours and annual expenses shown on Plaintiffs' Exhibit 72 of $87,520. This includes the debt service payments to the PWA. That is part of the cost of delivering the kilowatt hour to the consumer's meter—the debt service and the depreciation is a part of that cost.

I have been through Texas; never stopped off very long—just gone through on the train. I have had nothing to do with operating utilities in West Texas.

My item for depreciation of $9,600 per year, is the amount

which upon a sinking fund 4 per cent basis, would at the end of the useful life of a plant equal the total cost of the plant. I simply have made an arithmetical calculation as to what amount of money, set aside each year for 25 years, at 4 percent interest compounded, would produce $400,000. This is the item that I checked by some report of the New York Power authority—State of New York. I used the Wisconsin Public Service Commission report on depreciation as one of the sources used in the table of useful life of various items of property. I did not make any allowance for West Texas conditions. I have never personally investigated operating conditions in West Texas. I have never had any experience with dust storms in West Texas. If it be a fact that actual experience in West Texas shows that the life of the Diesel engine is 15 years rather than 21, I would think that that experience should be substituted for the data which I obtained in examining the reports of the Wisconsin Commission and the New York Commission. I would qualify that by stating that all the estimates of the useful life of such machines as Diesel engines and generators are based on the experience of 15, 20 and 30 years ago, when those engines were nothing like so well built and so strong as they are at the present time.

644 I used the table of the Interstate Commerce Commission as supporting data on life of electric conductors. The Interstate Commerce Commission says that they allow the wire companies 100 years for the life of their overhead copper conductors. Yet I used 47, taking it from the Wisconsin table, which is supported also by the Internal Revenue and the PWA tables prepared for the same purpose.

So far as my life expentancies' figures are concerned, it is correct to say that none of them is based on any West Texas experience and data. I did not check my conclusions by consulting a report of Wisconsin Public Service Commission. I took the data from an editorial analysis of data secured from the Wisconsin Public Service Commission, published by the Electrical World. I could not check the analysis of the Wisconsin Commission; I never saw that. But the analysis made in the Electrical World, I thought was very clear and fair. I did not think anyone would suspect the Electrical World of being a proponent of munic-

ipal ownership. The Plainview plant is not built to serve the entire demand of Plainview. If the private utility were to leave Plainview, the proposed municipal plant would not be adequate to serve Plainview. In this particular case I think the load factor would favor the municipal plant if—as I think—the City got the pumping and lighting load, which would be—a large part of it—an off-peak load. Under my estimate, this plant could take care of the load for the whole 14-year loan period, assuming the division I have set up in my estimate. The figures which I used as a check, from the Wisconsin Commission relating to per kilowatt hour cost, included no sum for amortization, as do the figures which I have charged to the plaintiffs. Assuming that a Diesel engine would operate for 25 years, it might but I do not think it would complete as to costs of operation with a new
645 Diesel engine for, say, the last ten years. That would depend on several unknown factors. Its efficiency would decrease at the end of the 25 years. I happen to know that the first plant I built has been in operation 25 years and is turning out just the same—three years ago when I visited it—as when I turned it over to the operating company at the same or less cost per kilowatt hour because it is turning out more current and I can cite any number of instances just like that in my own experience.

Whereupon the following occurred:

646 Mr. Scott. At this time we offer in evidence the document marked "Defendants' Exhibit 10 for identification," which purports to be a letter from the Administrator of Public Works to the Congress, containing a report which was requested by a resolution of the Congress concerning the activities of the Public Works Administration.

Mr. Acheson. What is the purpose of the offer?

Mr. Scott. The only purpose is to show the policy of the Public Works Administration, its functions under the act of Congress to establish a comprehensive program of public works, which was engaged in. It is a public document, and it has been submitted to the Congress in pursuance of the request of the Congress and purports to be an official communication from Mr. Ickes in his official capacity to that body.

We take it that your Honor could take judicial notice of this, but we should like to offer it in evidence here.

Mr. Acheson. I have no objection to it as a report. I assume, of course, that it is not proof of the truth of everything stated in it.

The Court. No, but it may be available as a declaration of policy.

Mr. Scott. As to policy and as to program. It demonstrates exactly what happened.

The Court. Well, I will receive it.

Whereupon defendants' exhibit 10 for identification was received in evidence as defendants' exhibit 10. The said exhibit is attached to this statement and made a part hereof.

647. Whereupon **Harold L. Ickes**, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

I am Secretary of the Interior and Federal Emergency Administrator of Public Works. The fundamental purpose of the Public Works Administration was to put as many men to work as possible of those who were not then employed. A secondary purpose was to stimulate industry, to stimulate the demand for goods of all sorts, so that that stimulation in turn would give employment; it was to aid in the economic recovery of the country through the employment of men out of employment. Wherever the PWA were proposing to make a grant only to aid in financing municipal power projects, and no loan whatever, I did not take into account the rates to be charged by the city and the competing private companies. Also, where money was lent on general obligation bonds to a city of good credit, PWA was not concerned about rates. But where the money lent was evidenced by revenue bonds then PWA did concern itself with the rates to be charged by the city and by the competing companies for the purpose of being assured that the rates charged would yield sufficient revenue to operate the plant, take care of overhead, and leave a surplus to take care of the loan.

The press releases of September, 1934, Plaintiffs' Exhibit 33, in general stated my policy with respect to municipal power projects, although our policy was naturally more or less subject to change. It was variable. We were

embarking on a new field, but in general, the release sums it up here, "We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities". The statement I made in response to your question as to my concern with rates more accurately expresses the policy than the Press Release of September 27, 1934. That press release was not designed as an administrative order. It was merely run-of-the mine publicity. The press releases put out by PWA run
648 into the thounsands. A press release is merely to advise the public in general what we have done or are doing or propose to do—very few of the latter, because our policy has been not to predict.

Under the order dated May 9, 1934, (Plaintiffs' Exhibit No. 32), an Electric Power Board of Review was set up to be advisory to the Administrator with particular reference to applications which had not been approved by the three reviewing divisions. Its authority was never enlarged. It had no power to formulate policies. I never authorized it to make determinations as to action to be taken by me or anyone for me. The Board was dissolved March 16, 1935. I was not satisfied with the way it was functioning. It seemed to me to have taken unto itself powers which it had never been intended it should have. I so admonished the Board. I had called for special reports from time to time. I had sent for Mr. Hunt and talked matter over with him. The photostatic copy of a memorandum dated January 30, 1935, from me to Mr. Hunt refreshes my recollection as to an occasion when I discussed such matters with Mr. Hunt. Whereupon, the following occurred:

By Mr. Frank:

Q. Will you tell the Court, on the basis of that refreshed recollection, what happened at that time?

Mr. Jackson. Just a moment. We object to this, solely upon the ground that in the case of the plaintiff we were excluded from showing any communications between the Administrator and any of his agencies.

It is our position that the defendants may not now show such part of those communications as they deem helpful, having caused the Court to exclude ours.

The Court. That is not the question here. The question is, What did he do? His recollection is refreshed by a document now. The question is not what the document
649 is, but what did he do, as I understand it.

Mr. Frank. More than that, your Honor, I do not want to let go unchallenged the statement that your Honor ruled, on the basis of our objections, that directions and instructions from the Administrator to his subordinates could not be introduced in evidence. There was a persistent effort on the part of the plaintiffs to show memoranda coming to the Administrator. What I am asking him about is what he did, and what he told a subordinate.

Whereupon there was argument by counsel. The defendants' counsel pointed out that the memorandum in question was written to Mr. Hunt and related to Mr. Hunt's correspondence with reference to the application of the Village of Hiram, which the plaintiffs had introduced in evidence. Counsel for the plaintiffs pointed out that the Hiram letter was admitted subject to a motion to strike as a foundation for a line of testimony which, upon being offered, was objected to and all the testimony was excluded. There then occurred the following:

The Court: I will overrule the objection to this question. I think this question is proper.

Mr. Jackson. I object to the form of the question, as it seems so indefinite.

Mr. Frank. There was a previous question.

Mr. Jackson. May I have an exception to your Honor's ruling?

The Court. Certainly.

By Mr. Frank:

Q. On the basis of that refreshed recollection, will you state to the Court what action you took concerning correspondence by Mr. Hunt with respect to the city of Hiram, Ohio?

Mr. Jackson. We would like to interpose the same objection and upon the further ground that it attempts to prove a policy by a question dealing with a particu-
649A lar situation when the Secretary has already covered it generally.

The Court. Very well.

Mr. Jackson. We note an exception.

The witness resumed his testimony as follows:

If the court please, in order in make my answer intelligible it will be necessary for me to give just a bit of background with respect to this particular project.

The City of Hiram, Ohio, had applied for a loan,
650 I think, and grant,—I am not clear on that at the moment—for a power plant. That had passed all our examining divisions and had been submitted to me as Administrator. I had approved it. It had gone through the board and had been approved there. It had been approved subsequently by the President. I learned later that there has been correspondence between the town officials and Mr. Hunt, in which he had raised certain questions as to whether or not the allocation should be rescinded. When that was brought to my attention I wrote him this memorandum, in which I recalled to him that the Electric Power Board of Review had merely advisory powers, and that in any event he had no authority to overrule the Administrator and the President of the United States. I do not appear to have advised him in this memorandum as to what the functions of the board were to be thereafter. The last sentence of this memorandum refreshes my recollection that I told him that in the future the powers of the Electric Power Board of Review were to be restricted to the original grant of power, which was advisory only. I identify the paper which has been referred to in my recent answers as a photostatic copy of a memorandum which I executed and sent to Mr. Hunt. Whereupon, Photostatic copy of memorandum, January 30, 1935, Ickes to Hunt, was marked Defendants' Exhibit No. 11 for identification, and offered in evidence as defendants' exhibit No. 11.

Mr. Jackson. The plaintiffs object, as not a competent method of proof. We now have a direct offer of an intra-Departmental communication of a character which we understand to have been consistently excluded when offered by the plaintiffs. It has been used over our objection, under the guise of refreshing the Secretary's recollection, and we think it would also be incompetent to offer it in the form of refreshing the Secretary's recollection.

The Court. I will overrule the objection. I do not
651 think it is inconsistent with what I have done. I thought that I had admitted the definite action that was taken. The Administrator's conduct must be judged by what he did, his acts, and not by what led up to them.

Here is a definite act which was performed by the Secretary with respect to a certain board which he had created, and which, according to his testimony, had done something in violation of his wishes. I think it is perfectly proper. I will overrule the objection and you may have an exception. Whereupon, Memorandum, January 30, 1935, Ickes to Hunt, heretofore marked Defendants' Exhibit No. 11 for identification, was received in evidence.

652 *Defendant's Exhibit No. 11*

Federal Emergency Administrator of Public Works

Washington

January 30, 1935.

Memorandum for Mr. Hunt:

On June 20, last a PWA allocation was made on Docket No. 3412 for a power plant for the Village of Hiram, Ohio. This allotment was approved by the President on June 27. Subsequently the loan agreement was executed, both by the Village and myself, and apparently all requirements for putting through this loan have been complied with.

Meanwhile, it appears that on December 18 you wrote to the Village recommending the withdrawal of the application. This was without my knowledge and in spite of an order that I issued several months ago to the effect that no one on the staff had the power to overrule the President.

In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me in case of disagreement with the action taken by the PWA staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.

I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment.

In the future the powers of the Electric Board of Review will be strictly confined to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision.

ADMINISTRATOR.

Enc: Papers re PWA Docket No. 3412, Village of Hiram, O., electric power plant.

653 The witness then resumed. In the case of several of the cities whose contracts were involved in this litigation, there was an original contract and subsequently a new contract was executed which was substituted for the old contract. As the result of two court decisions some doubt was raised as to whether or not the Federal Government was assuming or had reserved continuing rights with respect to the carrying out of the contract itself, and, with respect further to the regulation of rates. It seemed to be sound from the Administration's point of View to make certain revisions. We did not agree with the rulings of the Court, but they were there and we thought we had better amend in certain particulars. My order dated July 31, 1935, Plaintiffs' Exhibit 144, created the Power Division. I had abolished the Power Board of Review, but still felt the need of some division in PWA that would be charged with particular responsibility with respect to power applications, so I set up the new division.

Referring to orders in evidence directing that preference should be given by state officers to the examination of municipal power projects, I felt that, whether or not there had been some clever sabotaging in my own organization on power applications, they had not had a fair break. They had been retarded for one reason or another, and it was to bring them up to parity with respect to time with other applications that I issued that order.

There are now many letters received in PWA each day addressed to me as Administrator. During the height of the season there were several thousand a day. Such letters are not invariably read by me. Any communication that is marked "Personal" comes to my desk. Those I handle personally. I do not mean that I read all of those. Some of them are obviously not personal, from the appearance of the envelope. Those go out to take their chances with the

ordinary run of mail. The ordinary run of mail is handled by men on the staff. A great deal of it is routed and never comes to my desk. Some of it does come to my desk,
654 even communications that are not marked "Personal," when they seem to involve questions of policy, when what seem to be legitimate complaints of the operation of the organization are made. Those come to me, and they are handled either personally by me or are routed directly by me. If a letter written to me is answered by one of my subordinates, I do not invariably read the answer before it is sent out. I do not usually do so. The fact that a letter is signed "For the Administrator" by one of my subordinates does not mean that I have read that answer. I believe that most letters written in P.W.A. are thus signed. I couldn't say that as a fact because that would mean that I had looked at all of them, and I certainly have not. My orders are that letters should be signed by my subordinates followed by the words, "For the Administrator." I know in general the routine of handling applications for P.W.A. projects under title II of the Recovery Act. The application either for a grant or for a loan and grant was filed originally with the State Engineer. That was under our old set-up. If the State Engineer thought it was a good project, he submitted it to an advisory board in the State. Then it came in to Washington. My recollection is that they all came in but with a notation as to whether it had been favorably received or not by the State Advisory Board. I may be in error as to that, but that is my recollection. It was submitted for examination to our three divisions, legal, engineering, and finance.

If the reviewing divisions had found favorably, the Projects Division took another look at it. If it still thought there was no reason to send it back for the questioning of any of the findings of the reviewing divisions, then it came to me. I passed upon it first. Then it went to the Special Board of Public Works. If it passed there, then the projects or group of projects were made up in what we call the President's book, and I took that book to the President, and he either approved or disapproved.

The various divisions were not final. They had no
655 power to reject or accept finally. I made the determination. In reaching my determination that any

particular project should or should not be approved, I did not rely solely upon written data. I can not now tell the Court with respect to the particular projects which are involved in this litigation what particular data I relied upon in reaching my conclusion to approve those projects. I have approved all of those projects, and the President has approved all of those projects.

By the Court:

Q. You have no independent recollection of what you relied upon in reaching your conclusion except what is shown by the record? A. Oh, there were thousands of them and of course I could not carry them in my mind.

The Court. Oh, I know that.

The Witness. There are one or two outstanding projects that I do remember, but none of these happened to be in that category.

The witness continued his testimony as follows;

I know that in reaching my conclusion I did not rely solely upon written data. The discretionary power granted by section 203 (d) of title II of the National Industrial Recovery Act was never exercised. The phrase "social desirability" is not found in the statute. It is hard to say what the phrase means with respect to public works projects in general and, in particular, with reference to competitive municipal power projects. It savors of a general benediction at the end of a speech or a sermon. It was not capable of precise determination, but in general we held it to mean that, so far as it controlled our actions, a project in order to be approved was to be one that would be of some general benefit to the economic and social life of the community. I might add that considering the program was undertaken to put men back to work, there was a presumption of social desirability if a project did have the effect of putting
656 men back to work.

Referring to the comprehensive program of public works, mentioned in Sections 202 and 203 (a) of Title II of N.I.R.A., we had two duties to perform, as I saw it. One was to prepare a comprehensive program of public works. The other was to get men in as large numbers as possible to work as quickly as possible. In any conflict between the two, we felt that the latter took precedence.

We soon realized that to prepare a comprehensive program of public works would require months—perhaps a year or two—and that if we literally set about the preparation of a comprehensive program of public works, the very purpose of the Act itself would be defeated. So, we satisfied ourselves by developing the program of desirable public works as we progressed. We did not treat it academically at all, but practically.

657 Cross Examination.

The idea that I meant to convey, in what I have just said about the comprehensive plan, was that we did not sit down and as an academic proposition work out a program of public works. We took such projects as came to us as seemed desirable, as seemed designed to carry out the purposes of the Act—to put men to work—and we either allowed them or disallowed them, and out of that grew a comprehensive program of public works.

Q. In advance of the approval of projects from time to time you did not delay but laid out on paper a comprehensive program of such works? A. No, we had the idea in our minds, and we tried to conform to that idea.

The program from time to time was made of such projects as had been approved from time to time. The comprehensive program fluctuated from day to day, according as we approved or did not approve further projects. That was the only comprehensive program that we had. We offer now a comprehensive program of public works. It had been developed. It is there.

The term "social desirability" is not in the statute, as I recollect it. It was, however, included in Circular No. 1, "The Purposes, Policies, Functioning and Organization of the Emergency Administration, The Rules Prescribed by the President", under date of July 31, 1933. (Plaintiffs' Exhibit 119)

658 But there was no statutory mandate, and we could have changed our rules. This criterion meant, as a test for public works project, that a project must be of some general benefit to the community from the economic and social point of view. There was a presumption of social desirability if the project would put men back to work. The statement in Circular No. 1, Plaintiffs' Exhibit

119, that "No project will be considered which is a mere makeshift to supply work" was and is a correct statement of PWA policy in that regard. Dealing specifically with an application for a duplicating and competing municipal power project, there might be several elements of social desirability which governed the action and decision of PWA. You might put the municipality in the position of being able to supply current to its citizens at a lower rate. It certainly gave employment in constructing and in operating the plant, and it might have the effect of removing from the municipality the heavy, and in some cases the corrupting, hand of a public utility. All those were criteria which were proper to be considered by PWA in determining the social desirability of an application for a loan and grant for competing municipal projects. I think, in a general way, they were considered.

Independently of the question of social desirability, an application for a loan and grant for a municipal power project had to be approved as financially sound by the Finance Division, as feasible and technically sound by the Engineering Division, and as legally sound by the Legal Division. When these tests were met there was a presumption of social desirability. We had a right to assume that the community in applying for a loan and grant, or a grant, considered that the municipal life would be improved. We left that up to them largely. It is true that social desirability, at least as applied to the community, required that the project should bring some general benefit to the community from an economic and a social point of view. Upon
the hypothesis that I have just stated, we would not
659 necessarily have to go into the economic benefit to be
brought to the community by operating a competing power plant. The community sat as a jury and passed upon the facts and said, "We consider this especially desirable. This will benefit our community. Will you help us finance it?" The community had to decide in the first instance whether or not the project would be socially desirable, and in the absence of conclusive proof to the contrary, why, we did not attempt to overturn their finding.

Q. Mr. Secretary, in the case of an application by a municipality for a sewer system, did you consider the element of social desirability? A. We did. We assumed in that

case that it was socially desirable. I think we had a right to take it for granted that a municipality was not looking for a chance to spend its money for a sewerage system that was not needed.

Q. Did your engineers examine the projects to see— A. (Interposing)—whether or not it was engineeringly practicable.

Q. Did you or your agents examine the project to determine whether or not there was any need for a sewerage system? A. No, that was taken into account.

It is difficult for me to say whether we examined the project to determine whether or not there was any need for a sewerage system, or whether or not the sewerage system was adequate or inadequate for the purposes to be served. We may have and we may not have. I think, generally speaking, we assumed that during the days through which we had passed, when municipal credit was almost nonexistent and where a bond issue had to be in many cases approved by the vote of the people, they would not come
659A in and apply for a sewerage system or a waterworks system unless they needed it. The regulation in Circular No. 1, Plaintiffs' Exhibit 119, page 7, that the first test to be applied by the Administrator or the State engineer of PWA or the State Advisory Board is the relation of the particular project to coordinated planning, and its social desirability, was followed by PWA in a general way. After all, it was our own self-imposed regulation. This regulation was submitted to the President but even so, it was a self-imposed regulation. There was no statutory mandate. It was imposed by the President. But it is not quite as impressive as it sounds, after all, because even the President delegated his power to me, under the Act,
660 as Administrator. I do not happen to recall whether I subsequently prescribed any rules and regulations to supersede the President's rules and regulations; I may have. I had authority to do it. There were a great many press releases issued by PWA. Those releases, generally speaking, were issued by the PWA to inform the public of what PWA was doing. They were newspaper aids. That is a newspaper term. They were put up in the form in which a newspaper man would write articles in a newspaper. They were running comments on the news that was

coming out of PWA. They were truthful and accurate, but they were not always meticulous. When they quoted me I hope they were meticulous. I tried to be meticulous in the statements which I authorized to be given to the public about what I was doing in PWA. But even Jove nods occasionally.

The book, Plaintiffs' Exhibit 123 for identification, is a copy of a book published by me in 1935. The preface was written by me under date of May 15, 1935. The statement at the botom of page vii of the preface is a correct statement of my purpose, or at least one of my purposes, in publishing this book. It is as follows:

"In the circumstances it seems appropriate to render to the people some general accounting of what PWA has done and been during the almost two years of its existence and to give some indication of what it may be able to do during the next two years on the basis of the wider experience, the better technique, and the broader vision that it has acquired during its short but eventful life."

The attention of the witness was directed to the following statement, on pages 124 and 125 of Exhibit 123 for identification:

"In addition to the fundamental studies which are
661 being made by the Federal Power Commission by means of its PWA financing, a grant of $100,000 was made at the President's suggestion to the National Power Policy Committee. This committee was established for the 'purpose of developing a plan for the closer cooperation of the several factors in electric power supply, both public and private, whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic, and particularly to agricultural consumers; the committee is to be advisory to the President.' To this committee has been assigned the task of drawing together all the conclusions of the various commissions and experiments. 'It is not to be merely a fact-finding body, but rather one for the development and unification of national power policy.'"

The statements of fact in that quotation relate to an activity that was not a PWA activity at all. They are correct in the connection in which the statements are made. I have answered to the best of my ability. They are correct

in connection with the matter to which they relate. The National Power Committee was not established in PWA at all. It was merely financed by PWA and had nothing to do with PWA. I was the chairman of the National Power Policy Committee, I hold a good many positions. I am on the Migratory Bird Commission. Merely because I may be chairman does not tie the two together or interrelate them.

662 The attention of the witness was directed to the following contained in Plaintiffs' Exhibit No. 138, entitled "President's Letter Creating the National Power Policy Committee":

"In the following letter from the President to Secretary Ickes under date of July 9 the purpose and duties of this committee are outlined:

"'I wish to establish in the Public Works Administration a committee to be called the "National Power Policy Committee".'"

I think the language means just as it says. It was financed out of money granted by PWA, but we never considered it a part of the PWA organization. It is an independent outside unit. I do not challenge the statement read from the President's letter as to how the committee was created. I am answering the question from the point of view of how the committee has operated.

The attention of the witness was directed to the following statement at page 122 of his book, Plaintiffs' Exhibit 123 for identification:

"This wasted flow of water and the whole problem of cheap electricity in the United States engaged the attention of President Roosevelt long before the people sent him to Washington as Chief Executive. Repeatedly he has emphasized the importance of a more thorough development of our water resources and a more widespread distribution of electric power. Through PWA he has begun a double-barreled campaign to secure both for the Nation."

If the statements quoted are regarded by counsel as statements of fact, they are accurately interpretative of the actions of another man.

When I have to reply under oath whether there is anything untrue in the quotation, I would have to say that it is a general impression I had. I believed it to be true; and

still believe it to be true. When I referred to the power policy enunciated by the President "long before the people sent him to Washington", I don't know just what I
663 did mean. I do not know how long before. It was just a general impression I had of the President's attitude on power matters of which I had no personal knowledge. I think what I referred to must be taken from the language.

This book was a book written for general reading. It was in no sense a pracise treatise. If it had been, I would have quoted exactly from President Roosevelt. In a footnote I would have given the proper references. It was in no sense a legal brief. It was merely a discursive and perhaps not any too accurate statement in some particulars of current events. The question put to me whether I was referring to the power policy enunciated by the President in the campaign of 1932 is not a question capable of being answered except as I have answered it. If counsel is trying to find out what was in my mind and is scrupulous about getting the truth I have answered the question.

By Mr. Jackson.

Q. I think I am entitled to a direct answer. A. Unless the court directs me to repeat my answer, I submit that I have answered it.

The Court. I think he has answered it.

Mr. Jackson. I submit, he has not answered it at all, your Honor, and I ask for a direct answer.

The Witness. Unfortunately, I cannot give the answer that counsel wants.

By Mr. Jackson.

Q. All I want is the truth, Mr. Secretary, and I am sure you can give that.

Mr. Jackson. Does the Court decline to require the witness to answer?

The Court. I decline to direct him to answer any further than he has already answered.

663A Mr. Jackson. May our exception be noted?

The Court. Yes.

The attention of the witness was directed to a statement attributed to the witness in Plainiffs' Exhibit No. 143 for identification, being PWA Release No. 468, as follows:

"At present, rural electric rates are almost prohibitive. President Roosevelt is leading the effort not only to make cheap current more widely available, but to lower the cost of distribution and of electrical appliances. If any such dream is to become a reality, it will be under governmental leadership and supervision, insuring a development planned and carried out with advantage to the consumer,
664 rather than to the power companies, as the first objective."

My statement that the President is leading the effort to made cheap current more widely available and to lower the cost of distribution in electric plants is correct, as I understood, yes; but I did not quote him with authority.

The attention of the witness was directed to the following on page 125 of his book, Plaintiffs' Exhibit 123 for identification:

"Moreover, practical experiments, such as the huge power projects inaugurated and supported by the President under the other branch of his program, will throw valuable additional light on the problem, which, in turn, will be availed of by the National Power Policy Committee and the National Resources Board. Five hundred million dollars have already been allocated by PWA for definite projects to harness a portion of our potential water power. As we have seen, in the far Southwest, out of a deep canyon of the Colorado River has arisen Boulder Dam; in the Northwest human ants are building the Grande Coulee and Bonneville Dams on the Columbia River; in the Valley of the Tennessee the wartime Wilson Dam has been brought into fuller use and the Norris and Wheeler dams are being rushed for completion in 1936.

"Mammoth power plants, with intricate generators large enough to supply whole cities are being erected beside the dams; land is being cleared for huge reservoirs and thick transmission lines are being strung up to carry to home and factory the low-cost electricity that is to come.

"This activity is only the beginning of a national plan to increase the supply of electric power and to bring down its cost."

So far as the statements contained in that quotation are statements of fact, to the best of my knowledge and belief they are true and correct—with this qualification,

665 however, that I am not a competent witness to testify on the question of a national policy. As to whether the national plan referred to in this quotation is the same as the national power policy referred to at page 124, 125 of my book, I can only answer that by saying that the expression "national plan" is very loose language. There is no plan, so far as I know, in the sense of there being blueprints and engineer reports and a determination by the Administration itself that it is a national plan. It is not the same kind of a national plan to which I refer as the National Power Policy on page 125 of the book. There could be a national plan irrespective of a national power policy. A national power policy might merely be a question of adjusting and correlating rates as between existing power plants. I cannot answer the question directly. I regret that I cannot always give the answer that counsel wishes that I might be able to give. I answered to the best of my ability. Counsel knows that that particular question cannot be answered yes or no.

The attention of the witness was directed to the following on page 135 of his book, Plaintiffs' Exhibit 123, for identification:

"This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the Government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years."

That is obviously an expression of opinion. It is correct for what it is worth. Of course all of these statements are merely excerpts from two full chapters dealing with power. The whole thing ought to be read together to get the proper meaning. I testified in the case of the Duke Power

666 Company v. Greenwood County, on December 12, 1935, and I remember being asked that same question. I also remember that the book was put in evidence as a book, and not merely self-serving statements from the book. I was asked about that quotation and I said that it stated the facts as I understood them. That is what I say now.

The attention of the witness was directed to the following statement on page 134 of his book, Plaintiffs' Exhibit 123, for identification:

"This is the picture in broad outline of TVA at the present time. Soon, it is to be expected, the idea will be extended to other sections of the country. Moreover, TVA—and this is one of the main reasons for its establishment—will provide a 'yardstick' for the measurement of similar rates in other parts of the Nation, with the result of forcing pretty generally a reduction of private utility charges."

I think that has been regarded as a yardstick long before TVA came into existence. I think that was the point of view taken originally by Secretary Baker when the original development went in there. That states the facts as I understand them.

The attention of the witness was directed to a further statement at page 130 of his book, Plaintiffs' Exhibit 123, for identification:

"All together, it is expected that up to three hundred million dollars will be spent in the Tennessee Valley in the course of the next six years, including power development and land renovation. PWA approved the loans and grants to cities which wish to build transmission and distributing systems so that they can make use of cheap TVA power. Ten million dollars have been earmarked for this purpose, and one city, Knoxville, has been allotted $2,600,000 for the improvement and extension of its own system. Additional appeals for aid have been received from scores of towns and cities whose local governments are wistful for low-cost TVA power, but which are unable to raise enough money to build a distribution system or buy out the existing utility that continues to charge unduly high rates."

667

The quotation states a belief. I do not think that the statement that PWA set aside $10,000,000 for that purpose is an accurate statement of fact. We may have had that round sum in mind, but it was never definitely earmarked. We did not earmark money except in very rare cases. As a matter of fact, it says it is expected that up to $300,000,000, et cetera. There were definite allocations there. Those are statements of fact. I do not know it to be a fact that two

of the cases in suit here before the court involve seven towns in northern Alabama.

It would take one man's time to follow up this litigation, and I have never been able to do it. If my counsel agrees that that is the fact, I accept it.

I think we were willing to make gifts and loans of Federal funds to municipalities in this north Alabama area which sought to take TVA power for the construction of distribution systems and where the municipalities were unable to finance those systems but I think we have been held up by injunction proceedings in most of those cases. So it is not a fact that we have done it. We made allotments for that purpose. I cannot recall offhand just what they were.

I am willing to admit that Decatur, Florence, Sheffield, Tuscumbia, Russellville, Guntersville and Hartselle, Alabama, are located in that area.

I cannot testify as a fact that those are among the towns to which we made loans and grants for the purpose described in the quotation from my book which was read to me. I cannot testify to that as a fact, because I have not refreshed my recollection. It was a long time ago.

668 The attention of the witness was directed to the following contained in Plaintiffs' Exhibit No. 33, PWA press release number 989.

"Achievement in certain instances of the Administration purposes of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration."

I would not designate that as a statement of fact. It says lead to a clarification of the policy. The reference to the achievement of the Administration's purpose of making electrical energy more widely available at cheaper rates is correct for whatever it may mean.

The attention of the witness was directed to the following from Plaintiffs' Exhibit 33, in quotations following the statement that Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable."

That is a correct statement; but it should be borne in mind that there is a background to it. Any government which is based on politics naturally claims the credit for whatever is done. There was no misrepresentation in that statement at all. But I think that should be clarified. In no instance did we stimulate these applications. They came in voluntarily, and I do not think it is accurate to give the impression that we went out deliberately to establish this kind of a policy. We merely took the applications as they came in. We accepted them or we rejected them. I do not want to leave the impression that I went out and stimulated applications. There should be taken into consideration the time in which the statement was made in that connection.

The attention of the witness was directed to the
669 following from Plaintiffs' Exhibit No. 33:

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation."

I do not think that is an accurate statement of what our policy finally crystallized into. We were working out this thing as we went along; and that statement taken in connection with a sentence in the concluding paragraph—"We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities"—that, in the final analysis, was our policy.

The statement just read to me would be an error if taken by itself; yes. The whole thing is to be considered together as a statement of policy.

The statement that unless the municipal utility could offer lower rates there would be no social betterment, is not an application of my criterion of social desirability. That was just a general statement which, taken with the entire statement, I think, does not have the meaning that counsel

seeks to place upon it. I was not writing one sentence; I was writing a complete statement, and the complete statement is here, and that complete statement I am perfectly willing to let stand.

As to the passage:

"To make loans and grants to finance projects
670 where the competitior offers rates which are lower than those possible by the city plant would duplicate facilities without any social betterment"—

I mean what I mean on the basis of a fair interpretation of the entire statement. That is the only answer I can give.

The attention of the witness was directed to the following from Plaintiffs' Exhibit No. 33:

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect."

My answer to the question whether that quotation is a correct statement of the facts is the same as to the preceding question. It is a correct statement when taken and interpreted with the entire statement.

I cannot recall that we ever did cooperate with cities to prevent rates rising on an indication municipal plants may not be built. As I say, our whole power policy was a developing thing. It was new. We did not know from day to day just what would be the best ultimate policy. What the ultimate policy was is capable of quite precise determination.

I think in the case of Florence, Alabama, we took the position that since TVA, which was another government agency created under a separate statute, was trying to work out its problem, we ought to cooperate with it, and I did, as a matter of fact, do whatever I could to help TVA work out its problem.

Our power policy never really was changed, but there was a development there. There were various factors that we considered from time to time as perhaps calling for a variation or modification; but all through ran the idea that it was up to the municipality in the final analysis to determine whether or not it wanted a competing power
671 plant where it already had one.

The attention of the witness was directed to the following statement on page 136 in his book:

"It has been the policy of PWA to make loans for municipal power plants when such projects are sound from a legal, economic and engineering point of view. The question of public policy involved is left to the municipality concerned. However, we have applied certain general rules. We have decided not to approve a project unless it is self-liquidating at rates lower than or approximately equal to those of the utility company serving the community, and we have determined that the earnings of the proposed system must be applied to the system itself wherever possible under the state law and not siphoned into the general tax fund except in amounts not greater than the taxes which would be paid in case the system were privately owned. Where the existing private system has transmission lines or plant equipment that can be merged into the proposed municipal enterprise, we have encouraged its purchase at a reasonable figure. Finally, we have always given the private utility an opportunity to meet the city's proposed rates, and, if this is done, the city is afforded a second chance to lower still further its anticipated charges. But we have uniformly reserved the right to help a city which desires its own power plant even if the suggested rates will not be lower than those of the private utility."

That is a correct statement of our policy as of the date when the book was written.

The attention of the witness was then directed to the following on page 137 of his book, Plaintiffs' Exhibit 123, for identification:

"It has been my position that there are definite intangible values flowing to a community that owns and operates its own utilities. A strong case can be made for the proposition that if the people of the community want to
672 own their own public utilities and are able to finance them, they should not be denied that opportunity merely because the rates necessary to be charged in order to pay overhead and to liquidate are equal to or perhaps even slightly in excess of rates already currently charged by privately owned utilities. We do not attempt to dictate to another what he may buy within his means, even if we regard him as being extravagant; in addition to which there

is a considerable price which a municipality can afford to pay in order to rid itself of the domineering tactics and corrupting influences too often resorted to in the past by private utility interests."

I would not call that a statement of fact. It is a correct statement of my opinion.

It does not say it reflects PWA policy. It is my own personal belief. It does not reflect PWA policy. PWA policy is evidenced by the acts and written commitments of PWA —by that alone.

I recall testifying in the case of Duke Power Company v. Greenwood County, at Spartansburg, South Carolina, December 12, 1935.

At that time the paragraph you have just read was read to me and I then testified that that correctly states the PWA policy, in contradistinction to what Mr. Rose said our policy was. However, it is not, and has never been, PWA policy in the sense that it was set down as a formulation of PWA policy. I think it is fair to say that it is my own personal opinion and, as such, necessarily has some relation to what we were carrying out as PWA policy.

I do not know that I can answer specifically whether there has been any change in the power policy of PWA since I published this book, Plaintiffs' Exhibit 123 for iden-
673 tification. As I said this morning, the policy of PWA was an evolving policy and, in the end, the policy was that in the final analysis it was up to the municipality to determine whether or not it wanted a plant of its own, provided, of course, it could finance it. That is the policy that, generally speaking, we have been working on. When that became the definite final conclusion of policy I could not say precisely, but all the time we were working towards that.

I have answered the question whether there has been any change in our power policy fully and completely.

If counsel did me the courtesy to listen to my previous answer, I said I could not fix the precise date, which is as direct an answer to the question whether there has been any change in the power policy of PWA since I published this book in May, 1935, as is possible for anyone to make.

My answer is the same to the question whether there has been any change in the power policy since Plaintiffs' Exhibit 33, PWA release 989 was issued.

I do not see how it is possible for me to say more clearly than I have that I cannot fix any precise date when the final policy was finally arrived at.

It was an evolving policy, out of which has come what is now our present policy. When that was crystallized I cannot say. There would be no object in my evading the question if I knew, but I do not know.

There followed the following questions and answers:

"Q. I have the feeling that we may not be understanding each other. I am not asking you for any date, Mr. Secretary. I want to know whether, regardless of any date, there has been any change in your power policy since plaintiffs' exhibit 33, PWA release 989, was issued. A. It seems
674 to me obvious that I cannot—

"The Court. That involves the date of that release.

"Mr. Jackson. That is true, sir, but that date is fixed as August, 1934, as I recall it, or September. Mr. Frank supplied it this morning.

"I am asking him if anything that has happened since that time—

"The Witness. I have said that I could not fix any date. If I cannot fix any date, I necessarily can not say whether there has been any change since any particular date."

In the case of Duke Power Company v. Greenwood County, on December 12, 1935, I was asked certain questions and made answer as follows:

"Q. Your attention has been called by your counsel to what is known as release No. 989 having been produced by Colonel Hunt, but it was introduced by us. That release states that 'Achievement in certain instances of the Administration's purpose of making electric energy more widely available at cheaper rates today leads to a clarification of the policy on power by the Public Works Administration.' Has there been any change in that policy or that purpose since August 26, 1935? A. It was not written by—it was released by itself, and as an entire document, taken in connection with subsequent releases and enunciation of policy.

"The Court. But you have to go back to answer whether there has been any change. You can ask if there has been any change in the purposes or policies of the Administration in reference to the power rates before.

675 "Mr. Robinson. And I understood him to say there had not been.

"A. That is correct."

In the same case of Duke Power Company v. Greenwood County, I was asked other questions and answered them as follows:

"Q. Now, Mr. Ickes, what I have read from your book correctly states the Public Works Administration's national power policy, as applied to all loans and grants for power projects, does it not? A. The Public Works Administration's policy is incorporated in the passages that you have read.

"Q. And there has been no change in that policy, as stated in your book, since August 26, 1935, when the final decree was entered in this case? A. No; that is correct.

"Q. And no change in your purpose and aims as Federal Emergency Administrator in carrying out that policy? A. No."

Those were my answers, but they may relate to an entirely different situation than is here presented. If all the passages in the book relating to power policy were taken together and considered as a whole, I think that it is fair to say that they do, as I say—that the policy is incorporated in the passages. That was my answer.

I would have to read chapter 6 of my book before I could answer the question whether that chapter if read as a whole, would fully reflect our power policy. The book has not assumed that importance to me yet, that I memorized it.

I understand there are two chapters on power here. I am not sure the two chapters correctly reflect our policy. I am just trying to determine. I think the preceding

676 chapter deals largely with power—chapter 5. Substantially, there are two chapters dealing with power, most of which, however, deal with Federal water-power projects. Only about 10 pages deal specifically with municipal-power projects. I would have to re-read them, but my impression would be that the policy, as formulated and determined upon up to that date, is expressed there. There is also a very broad general discussion of related matters, which are not necessarily statements of policy.

This book, taken as a whole, was, after all, my own interpretation, for popular consumption, of what the Government was trying to do under this relief program.

PWA was a going concern, and spoke officially, not only on matters of policy, but on other matters. I was the official charged with its administration, and with fully delegated powers from the President, but, nevertheless, I am not speaking officially here.

I do not want to give any impression that because I am not speaking officially I fail to state the facts as carefully and as accurately as I can. It is just like a lawyer discussing a lawsuit. Where he is discussing it in Court, he is very precise. When he is discussing it outside, he may descend to the vernacular, and discuss it from the popular point of view, in order to reach the understanding of the people for whose benefit he is discussing it.

The attention of the witness was then directed to the following from Exhibit 33.

"In all allotments made for municipal power plants by the Public Works Administration, proposed rates have been well below existing private-company rates. Consequently, the fact that the companies in some instances have met those proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of
677 the public-works program."

The whole statement covers what I was attempting to cover. The whole statement should be read together. If you take any paragraph or any chapter out of the Bible, you can make it appear to be entirely different from what it appears to be in the proper context. That was an interpretation by someone else. It may or may not be accurate. Standing alone, it does not represent the facts. Moreover, it does not even purport to quote me.

The following question was then asked, an objection sustained and an exception noted by plaintiffs.

"Q. You recognize, Mr. Secretary, I did not suggest it quoted you. Did you take any step to correct that statement, Mr. Secretary?"

The attention of the witness was then directed to a statement in Plaintiffs' Exhibit 141 for identification, which is a release of the Federal Emergency Administration of Public Works, quoting an article written by the witness entitled "Jobs Versus Dole"; published in the magazine Today, of the issue of November 17, 1934.

"This is not the place for a detailed discussion of the power policy of Public Works, but that policy also conforms to the general purpose to strengthen private enterprise. There is nothing, with the possible exception of the comprehensive housing program, that holds more promise for the future of industry in this country than the development and utilization of cheap power. Great natural water-power sites are being developed for the benefit of the communities they serve. Private companies serving these communities will, where sufficient power is developed, have an opportunity to purchase the cheap power if they are willing to share its benefits with their consumers. Loans for municipal power plants have been granted only upon application of the municipality concerned and upon a clear
678 showing that the existing rates can be substantially reduced after adequate provision for interest and amortization. Private companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA."

I assume it is a correct quotation, and it correctly states the facts as of that time; but, as I have said, over and over again, the power policy of PWA with respect to municipalities was an evolving policy, and the policy now and for some time has been that the question of rates did not enter into our decisions necessarily. It was a matter for local determination.

In reply to the question whether as of that date, I meant by the statement that "private companies furnishing adequate service at reasonable rates have nothing to fear from the power policy of PWA", that they were warned that otherwise I would supply funds to construct competing plants, my answer is that I stand on the statement as of that date.

On page 136 of my book I said: "The question of public policy involved is left to the municipalities concerned". That is right.

Q. As I recall it, in exhibit 33, that is, your press release No. 989, you say, at the end, that the question of whether there should be municipal competition is a public policy settled by the States, or something to that effect. Is that substantially right? A. Settled by the municipalities.

Q. Well, acting under the jurisdiction of the State. Am I substantially right? A. I have never made any such statement as that. They act under whatever legal authorization they are acting under. That is a question of law that I am not competent to testify on.

678A In my investigation of this subject, or my connection with it, it is not true that I found that many States authorized municipalities to compete with privately operated utilities. I did not look into it. I have just a general impression on it. I did not make loans and grants to municipalities for competing utilities without determining whether they were permitted to compete under

679 state laws but those questions were determined in the legal division.

I never made any investigation to find a state that had a policy of providing a gift or subsidy of 30 or 45 per cent of the cost of a municipal utility whenever it should desire to compete with an existing utility.

On my direct examination I said that where a loan was made on general obligation bonds we were not concerned about the rates of the existing utility. I think that is what I said. In the case of general obligation bonds, generally speaking, we did not examine, consider, or investigate the rates of the existing utility. I believe we did make a loan to the city of Coeur d'Alene, Idaho, or enter into an agreement with it, or make an allotment. When I say "I believe we did" I do not know whether that is still an outstanding obligation or not, or whether it has been rescinded. I just do not happen to remember. It is correct that at one time we did have an allotment to Coeur d'Alene whether or not it has since been rescinded.

It is not within my knowledge whether that was an allotment for a loan upon general obligation bonds of the city of Coeur d'Alene. I have not refreshed my recollection on it. It is true that I quite recently authorized the dismissal of our appeal in the Ninth Circuit Court of Appeals at San Francisco.

The attention of the witness was then directed to a copy of Plaintiffs' Exhibit 232 for identification, which purports to be a telegram to the President of the Washington Water Power Company, signed "Harold L. Ickes, Administrator." I have no means of telling from this whether it is a copy or

not. I think there was some telegram sent. Whether it went over my desk or not, I am not sure. If the records of PWA show that I signed it, I would not question that. The copy of page 60 of the transcript of record in the Coeur d'Alene case in the Court of Appeals for the Ninth
680 Circuit which has been shown me does not refresh my recollection as to my having sent that telegram. This does not do any more than the other did. It went out over my name, but whether it went out over my desk and I saw it, I cannot determine from this.

The attention of the witness was then directed to the following from page 146 of his book, Plaintiffs' Exhibit No. 123 for identification:

"By January of 1935, 12 municipal power projects had been completed. Forty-eight others were under construction. Thirty-four more had been approved by the Power Board, and about 71 were under consideration. The total amount allotted at that time for this purpose was $48,784,300." That undoubtedly correctly states the facts as of that time.

The next paragraph is likewise correct:

"One of the most important accomplishments of PWA, although an indirect one, has been a saving to consumers of millions of dollars through the lowering of rates by the private utilities to meet the charges proposed by applicants for public power projects. This rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant."

When I refer there to applicants for public power projects, and the 200 applications, I refer to applications for construction of power projects by municipalities or some other public corporation of that character. It would appear those were competing projects, where I refer to the reduction in rates. I think that is a fair conclusion. I cannot state it as a fact.

I believe the next paragraph on page 147 correctly states the facts as of that time.

"These yardsticks provided by both municipal and Federal enterprises are so valuable that they alone would
681 warrant PWA's expenditures for power undertak-

ings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the Federal projects have brought about rate adjustments over still larger expanses of territory."

When I refer to yardsticks provided by municipal enterprises, I refer to publicly owned power projects constructed by municipalities and similar state corporations, public corporations, through the aid of loans and grants from PWA. I am talking here of PWA expenditures alone, in this paragraph. The municipal enterprises I refer to here are those competing power plants which PWA financed in whole or in part. That is what I referred to. I do not know whether I do or do not there deal with municipal projects that we did not finance; but to the extent that we did finance them, then the statement is correct, from my point of view.

682 It was our intention to make loans to municipalities for competing power projects when, and only when, those projects would be self-liquidating. I don't know whether where there was an application for a loan and gift of Federal money for the construction of a duplicating and competing municipal utility, it was necessary for the proposed municipal utility to obtain all or a substantial part of the business of the existing utility in order to be self-liquidating. I have examined a document which has been handed me marked "Plaintiffs' Exhibit 235", entitled "Non-Federal Public Works that are deemed desirable, List No. 53, recommended by the Special Board for Public Works." This particular one is marked "Confidential" and is dated February 1, 1934. On every project there was a very large docket, which does not appear at all. The findings were based upon that docket, but the findings were not written findings. There were no written findings.

I did volunteer the statement in the course of my cross examination that PWA never did anything to stimulate the filing of applications for projects. Shortly after PWA was organized in 1933, and I was confronted with the problem of getting projects upon which to expend this large appropriation for public works, I did give out to the press of the country the information that PWA would make a gift to municipalities of 30 percent of the cost of certain public works and would lend the balance if the municipalities would undertake such public works, but that was not

what I meant by stimulation. We did do that. May I correct that? I don't know; we probably did do that, but necessarily news went out through the customary agencies the minute the law was passed, before PWA was really set up, that this law had been passed and that that would be the effect.

It is further a fact that I, for instance, made an address before the Conference of Mayors at Chicago in 1933 in which I told all of the Mayors that I stood ready or
683 PWA stood ready to lend 30 percent of the cost of such projects, or to give, rather, 30 percent of the cost of such projects and lend the balance. But since I used the word "stimulation," it might not be improper for me to be permitted to say what I mean by stimulation. What I mean by stimulation was sending people to the municipalities direct, to try to interest the municipalities in particular projects. This other was just a general invitation; and invitation, if they had anything, to come to us.

Necessarily we were trying to carry out the mandate of Congress to put this money to work in order to help in the industrial recovery. We did give out these general statements giving publicity to the offer to make a gift of 30 percent and to lend the balance. That is what the money was for.

The attention of the witness was directed to the following from page 67 of his book: "To explain the machinery that was developed to cope with the emergency, let us take an imaginary project through the mill. Naturally we cannot find one that will contain every problem, but we can, at least, show in general our processes and the safeguards we have set up."

"Then the Public Works Act is passed. Nearby towns are given allocations for municipal projects. A State engineer of PWA comes into the city and calls on the mayor.

" 'Why haven't you got some business for us?' he asks. 'You don't mean to say your city is perfect?'

" 'Far from it,' the mayor replies sadly, 'but where are we going to get half a million dollars for a new sewage system?'

" 'You can get $150,000 from the PWA as an outright grant, and we will lend you the rest.'

"The mayor asks, 'How can we borrow any more money? We've already issued bonds up to our legal limit, and our municipal finances are in a pretty bad way.'

" 'You still have a good chance to borrow money
684 from the PWA. If legally you can lay a service tax on the new sewage system, say by charging the user so much for every tap, toilet, and bath tub, so that the revenue produced will pay off the loan in not to exceed 30 years at 4 percent interest, then you can get the money, both $150,000 grant and $350,000 loan. Otherwise, under the law, we have no power to let you have it.'

"After several such talks, the mayor becomes enthusiastic."

That is very far from being an accurate description of a typical problem of a project by PWA. We had one State engineer—

The Court (interposing). Do not continue. I would not go on. You have answered the question.

Redirect examination.

The routine procedure under the Emergency Relief Appropriation Act was more complicated than under Title II of the Recovery Act. I have a memorandum here that, with the court's permission, I would like to refer to.

After the passage of the Act in 1935 the procedure was substantially as follows:

The Assistant Administrator, after being satisfied from the advice of the heads of the several divisions, and after conferences with them and with others, that there should be an allotment for a project, would send to the Division of Applications and Information of the National Emergency Council an application for allotment of funds. There was a regular form for that. This was pursuant to Executive Order of the President, No. 7034. The Division of Applications and Information would then transmit copies of these applications to the Bureau of the Budget and the Works Progress Administration. When they had been reviewed by the Budget and the Works Progress Administration the Division of Applications and Information would transmit to the chairman of the Advisory Committee on Al-
685 lotments the recommendations thereon. The Division of Applications and Information would transmit

them to the chairman of the Advisory Committee with recommendations that had come back from the Budget and the Works Progress Administration. The applications which had been approved by the Director of the Budget and the Administrator of the Works Progress Administration were then put on the agenda for consideration by the Advisory Committee on Allotments. The Advisory Committee on Allotments, of which the Administrator of Public Works was chairman, would then confer with the President, and after presentation of data, both documentary and oral, some of the projects were approved by the President, and after they were approved the President would write a letter to the Secretary of the Treasury requesting that funds be transferred from the appropriation made under the Emergency Relief Appropriation Act of 1935 to the Public Works Administration for a state amount to cover the specified projects. That deals with the procedure after it had been either approved or disapproved. After they were disapproved they were out. If they were approved there was a certain procedure in which the Treasury and various departments and individuals were involved.

There was a change after August 27, 1935, so that instead of going to the chairman of the committee the projects went direct through to the President with my approval. There was no meeting of the Advisory Committee. But other than that the routine was substantially the same.

The loan portion of an allotment which supplements a grant under the Emergency Relief Appropriation Act of 1935 is approved by me and the President from the fund realized from the sale of securities held by PWA. That was the revolving fund, known as the Deficiency Revolving Fund. After there had been approval, if an agreement could be arrived at, then a contract with the applicant was signed, either by me or some one authorized to sign
686 contracts. Technically it was a contract, and it consisted of an application and an acceptance, an offer and acceptance.

In my cross examination I spoke of the activities of the Special Board of Public Works. That board had only advisory functions, and, after a time, it ceased to meet with me altogether. I have data before me showing the number of PWA non-Federal projects.

We made allotments on non-Federal PWA projects to the number of 7,957 for a total amount of $1,222,636,961. Of these 260 are electric power projects. The total amount allotted by PWA for such projects is $70,082,656. That is 3.3 per cent of the total allotments. That is not the proportion of the amount of money but is the proportion of the number of the projects. The proportion of money allotted is 5.7 per cent. Of these electric power projects, 85 are for publicly owned electric power plants or distribution systems in places where there were privately owned facilities at the time of the allotment. That is 1.1 per cent of the total number of allotments. In amount of money the total allotment for that category of projects is $58,768,800. That is 4.8 per cent of the total amount of allotments.

In every county in the United States except three we have PWA projects today.

I interpreted "comprehensive program of public works" to mean that we were to make as wide and even a distribution as possible of these projects, taking into account the populations of the various states and communities, and particularly the unemployment situation in the states and communities.

I spoke of the power policy as an evolving policy on my cross-examination, and earlier in my direct examination I explained to what extent I did and did not consider rates with respect to different types of competitive municipal projects, dividing them into those where there were
687 grants, general obligation bonds and revenue bonds.

The policy as described in my direct examination describes correctly my present policy.

On cross-examination I made the statement that my findings, and the President's, so far as he made them, were based upon the docket. On direct examination I said I relied not only upon documentary data but also upon conferences and oral communications. The statement in cross-examination was not testified to to destroy or correct what I said upon direct examination. I stated in the preface of my book "In the pages of this book, therefore, I am trying, in broad outline, to tell the people"—and then I went on with what PWA was doing. That correctly describes the character of the book. The jacket of the book says that I

am giving in this book "in readable form the full history" of the organization.

That was the intention. I do not know whether it was given effect or not. It seems to interest some people on some occasions.

Mr. Frank. In order to avoid a false impression that might be created by taking sentences from pages and skipping about throughout the book, and not for the purpose of proving the facts therein stated, we now offer the entire book in evidence.

The Court. That is what suits you, is it not?

Mr. Jackson. I tried to get Mr. Frank to accept it.

The Court. There cannot be any controversy over that, then.

Mr. Frank. Let it be marked in evidence as Defendant's Exhibit No. 12.

Book entitled "Back to Work", by Harold L. Ickes, was marked "Defendant's Exhibit No. 12" and received in evidence.

The said exhibit is attached to this statement, and made a part hereof.

688 *Examination of the Witness by the Court*

Q. There has been evidence here and there has been some discussion and some argument along the line of tending to show that in the making of these grants for these public utilities projects the real underlying purpose was not so much the relief of unemployment as it was the coercion of the public utilities companies. I would like to hear what you have to say on that. A. That was not the purpose. We considered these projects just on the same basis that we considered every other project. I think that a showing can be made that they were justified from the point of view of the employment—direct employment and indirect employment. It just happened that that was one of the by-products. There did evolve—call it a yardstick if you want to—a measuring of rates, an opportunity, perhaps, to reduce rates in various municipalities for the benefit of the people who used electric current. Whatever may be said about some of the big water power projects, I think it is accurate to say that that was not the primary purpose in making these particular allocations. If the court will

consider that we made allocations for the building of all sorts of things, schools, sewers, waterworks, public buildings, roads, anything conceivable in the way of municipal service or a means by which municipal service could be rendered, it is not surprising that in the big list that I have made there are comparatively few allocations for power plants. There were very few, relatively.

Q. I realize, of course, that we are all of us human beings and that we all make mistakes, and so forth, and I do not know that I ought to say that there has been a direct allegation, but it is pretty close to dealing with the charge that the making of these grants to towns where there were electric lighting plants was not with an accidental purpose, but with the primary purpose not to relieve unemployment but to coerce the plants to reduce rates. A. We in no
689 case stimulated application. By stimulate I mean direct solicitation for particular projects at particular times. Of course we did hold out to the country that this money had been voted for this purpose. If it had been one of our major policies, instead of having comparatively few municipal power projects in number we would have had a great many. Our policy from the beginning, without variation—although, as I say, it was an evolving policy—in the final analysis we always felt that primarily it was up to the municipality to determine what it wanted. We did not inquire into the motive of the municipality, any more than we did when they wanted a library.

Q. One of the cases here shows that after the application had been made, and perhaps after it was granted, the local utility company reduced its rates. You know what I mean? A. Yes.

Q. And in some of the press releases that have been received, or in some of the documents, there is the statement that where the utility company agreed to transact its business at a reasonable rate, the PWA would not make a loan? A. And there were instances where, following a reduction of rates, the municipality withdrew its application. We always gave it the full right to do that.

Q. The main point that I wanted to hear what you had to say on was whether your policy was that of coercion of the utility companies, or the relief of unemployment. A. I think the fact is that we were willing to, and during the

carrying out of the program we did, take into account a reduction of rates, and if the municipality wanted to withdraw we permitted it to do so. We offered no greater inducement in order to build a competing plant.

690 *Redirect Examination Resumed*

The following question was then put to the witness by counsel for Defendant:

Q. Your purpose in making these contracts for those competitive projects always was to increase employment quickly as the statute required, and these other considerations were only incidental and collateral?"

To which counsel for Plaintiffs interposed an objection as follows:

We either want to object or move to strike out the answer on the ground that the question is improper; it is leading and, further, it calls for a conclusion which invades the province of the court. It is a material issue of fact to be determined by the court.

The objection was overruled and the witness answered: "That is right." Counsel for the Plaintiffs excepted to the ruling.

691 Whereupon, **Herman Bailey Byer** was called as a witness for and on behalf of the defendants and, having been first duly sworn, testified as follows:

Direct examination

I am chief of the Division of Construction and Public Employment, in the Bureau of Labor Statistics of the United States Department of Agriculture and have been for five years. I have been in the Bureau of Labor Statistics since 1919, in various positions, and have just gradually been promoted until I occupied my present position. The Bureau of Labor Statistics collects information on a wide variety of subjects of interest and value to both labor and industry. We collect data concerning employment, prices, construction, cost of living, and various other allied matters. The Division of Construction and Public Employment of that Bureau collects information concerning the volume of construction each month, as evidenced by the permits issued in all cities having a population of 2500 and over. And we collect data concerning pay rolls, monthly

pay rolls, and man-hours of work in all construction activities financed either wholly or partially from Federal funds. The maintaining of statistics of employment throughout the United States is one of the functions of the Bureau of Labor Statistics. The average number of persons gainfully employed in the United States for the 36 months' period from 1923 to 1925 was approximately 41 million, over the age of ten years. That is the basis of the census figures. That includes agriculture. Something over 8 million were employed in manufacturing. We subdivide persons employed in manufacturing, into two groups, those manufacturing durable goods and those manufacturing consumers' or non-durable goods. In the durable goods' group we include the firms manufacturing such products as iron and steel, machinery, transportation equipment,
railroad repair shops, non-ferrous metals, and other
692 products, lumber and allied products, stone, clay and glass products. Those are the durable goods.

In the non-durable goods' group are textiles and their products, such as clothing; leather and those things manufactured from it, such as boots and shoes; food and kindred products; tobacco manufactures, paper, printing, chemicals and allied products, and rubber products.

During the period from 1923 to 1925 the average number of persons employed in the durable goods' group and in the non-durable goods' group, were approximately equal. The durable groups were slightly in excess. There was something over 4 million in each group, during that period.

Whereupon a Chart entitled "Employment in the durable and non-durable goods groups, three-year average, 1923 to 1925," was marked Defendants' Exhibit No. 13 for identification.

The chart which has been marked Defendants' Exhibit No. 13, shows in graphic form the fluctuations of employment in the durable and non-durable goods groups. It was prepared in the Bureau of Labor Statistics. The index numbers at the left and at the right of the chart are intended to show the deviations from a normal period, or what you might speak of as a normal period; that is the three-year period from 1923 to 1925. In other words, we took these 36 months and found the average employment

and the employment for each month of the 36, and then divided the total employment for the 36-month period, by 36, to get the average monthly employment over the period, and called that 100 per cent. And then the index numbers, on either side, and the lines of the chart, show the deviations from that period. The years are marked at the bottom of the chart. From 1923 to 1929, there is a very small variation in the movement of employment in the durable and non-durable goods groups. Beginning with the latter part of 1929, the employment in the durable goods
693 industries decreased much more rapidly than in the consumers' or non-durable goods industries. The non-durable goods and consumers' goods industries also reached the bottom considerably earlier than the durable goods group. By June, 1932, they had reached the bottom of the trough. This was not true of the durable goods. Employment continued downward in that group until March 1933. The gap continued to widen until the middle of 1933, when it reached its widest point.

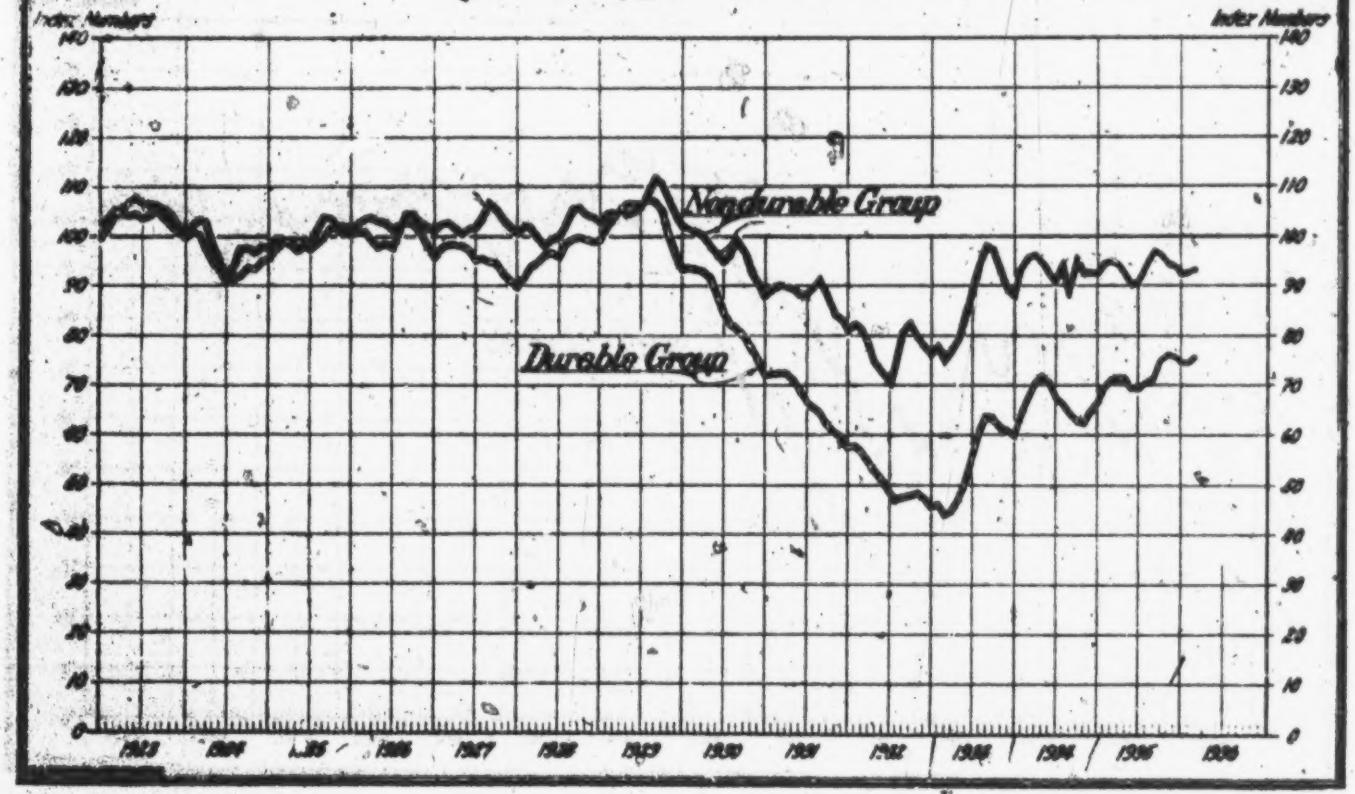
Employment in the non-durable goods group reached the bottom in June, 1932, and started upward. Of course, like all movements, it was not in a straight line; there were fluctuations. But the trend was upward from 1932.

In contrast, the employment in the durable goods group did not start upward until April, 1933. It moved upward quite swiftly during the latter part of 1933, and it has been gradually closing the gap between the two series until in March 1936 they were closer together than they had been at any time since the latter part of 1930 or the early part of 1931.

Whereupon Defendants' Exhibit No. 13 for identification was thereupon received in evidence, as follows:

EMPLOYMENT in the DURABLE and NONDURABLE GROUPS

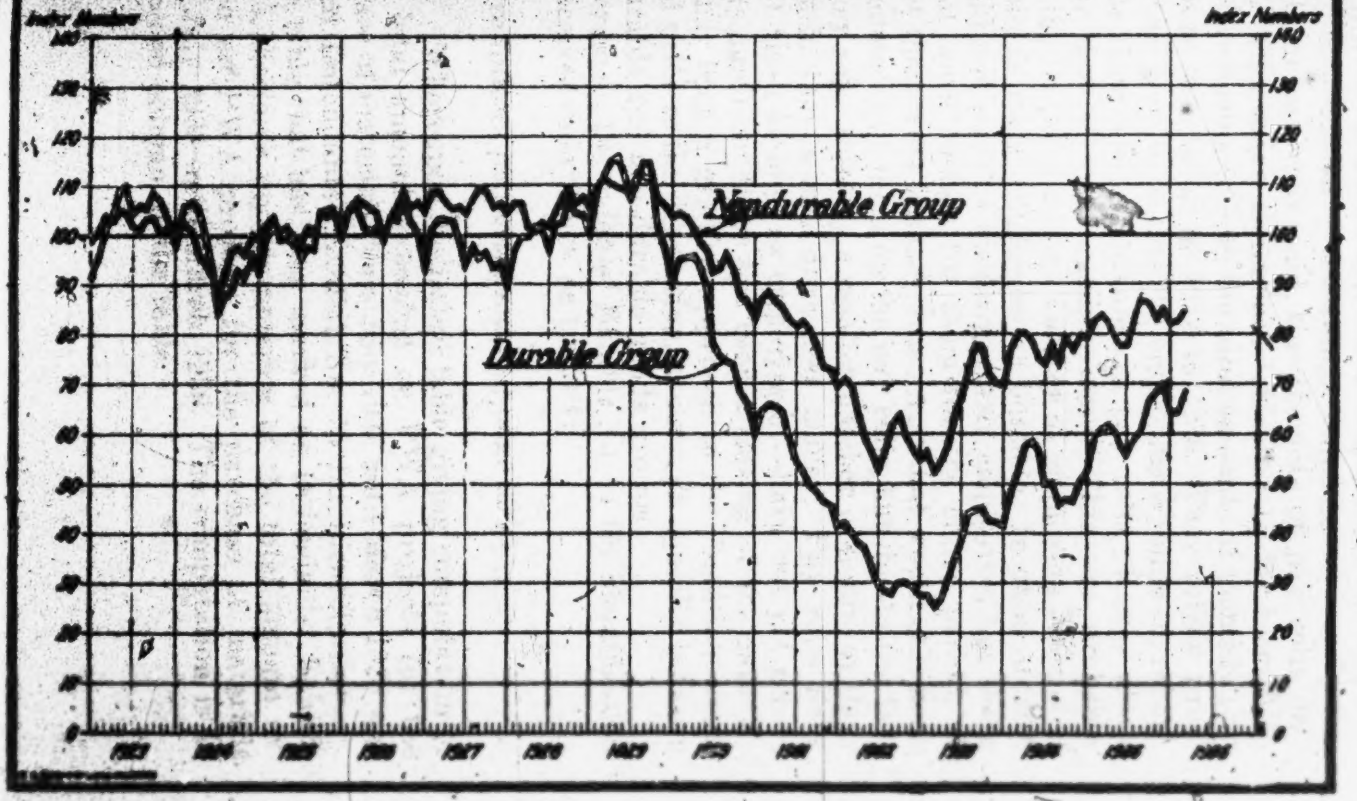
3 Year Average 1923 - 1925 = 100



Difficulty Ex. 13

Pay Rolls in the Durable and Nondurable Groups

3 Year Average 1923–1925 = 100



Syphilis & kind

696 Whereupon Chart entitled "Pay Rolls in the durable and non-durable goods groups, three-year average, 1923 to 1925, equals 100" was marked Defendants' Exhibit No. 14 for identification.

Employers of labor, in manufacturing industries, send to the Bureau of Labor Statistics each month, on our own forms, information concerning employment and the amounts of pay rolls paid, the amounts of pay rolls disbursed. This chart, Defendants' Exhibit 14 for identification shows fluctuations in the total amounts of monthly pay rolls over the period of 1923 to 1936. They follow practically the same lines that the employment followed, except that the drop was accentuated in pay rolls. It was much sharper than it was in employment. This was probably due to the fact that a large number of employers attempted to retain as many employees as possible. In other words, they did not want to discharge their employees, but there was not work enough for them for the entire period, so they let them work a short time. And that would still keep large numbers of them on the pay rolls, but due to the fact that they were working a smaller number of hours, or days per week, they would draw less money. Pay rolls have not yet risen as high as employment—have not yet recovered as much but there has been a closing of the gap. So there has been a gradual approach to the condition which existed prior to the depression, namely, an equality between the durable and non-durable goods groups.

Whereupon Defendants' Exhibit No. 14 for identification was received in evidence, as follows:

(Here follows photostat marked page 696.)

697 Whereupon statistical table giving computation of total amount expended on PWA projects for the purchase of materials from July 1933 until March 1936 was marked Defendants' Exhibit No. 15 for identification.

The table that has been marked as Defendants' Exhibit No. 15, discloses my computation of the total amount expended on PWA projects for the purchase of materials from July 1933 until March 1936. The computation is in the second column of the table.

Every Government construction contract, inclu
PWA contracts, includes a clause making it mandatory
the contractor to report to the Bureau of Labor Stati
the number of people on his pay roll and amount of
roll, the man-hours of work at the site of the constru
project, and the expenditures for construction mater
When the Government purchases any materials direc
they sometimes do in the construction of, we shall
battleships, and places an order direct with the Steel
poration, the Government agency making the purc
reports the value of the material purchased, to the Bur
All these figures come to the Bureau of Labor Stati
and the computation contained in the table marked
fendants' Exhibit 15 is made up from the figures so
ceived. The total is $1,177,000,000.

Whereupon Defendants' Exhibit No. 15 for identi
tion was recevied in evidence, as follows:

Type of Material	Total	PROJECTS				
		Public Works Administration 1/	Reconstruction Finance Corporation 2/	Regular Governmental 3/	The Public Buildings Administration: Federal Construction	The Public Buildings Administration: Operated by W. P. A. 3/
...rials	1,465,136,906	1,177,082,508	52,217,983	876,146,314	56,297,722	8191,392,358
...and their products:	1,735,250	1,470,421	124,467	42,940	97,422	5/ -------
..., tents, canvas, etc.	294,290	235,693	1,332	3,709	13,556	-------
...and rugs	62,537	62,537	------	------	------	-------
...and twine	376,039	293 33	9,137	22,135	51,434	-------
...goods	275,791	159,[illegible]	109,400	1,960	9,140	-------
...ods	184,301	178,363	4,447	69	1,422	-------
...ods	71,752	71,583	------	------	169	-------
...	315,195	284,279	151	12,590	18,165	-------
...al bags	33,235	31,189	------	121	1,925	-------
...ering materials, n.e.c.	132,492	132,005	------	------	487	-------
	29,688	26,188	------	1,956	1,544	-------
	4/					6/
...ducts:	86,604,525	62,995,259	1,822,036	2,992,397	6,538,810	12,256,283
...ducts	212,577	190,717	11,270	6,921	3,669	-------
...and timber products, n.e.c.	64,253,158	54,057,912	1,800,447	2,377,698	6,017,101	-------
...mill products	9,755,585	8,622,150	10,319	606,286	517,230	-------
...and door screens and weatherstrip	126,782	124,480	------	1,492	810	-------
...and Allied Products:	15,107,042	10,937,731	1,585,837	637,478	1,057,829	1,788,567
...tion and related products	1,085,536	1,085,144	------	------	392	-------
...le, miscellaneous	417,422	354,035	------	6,922	56,465	-------
...ed and liquified gases	498,468	332,351	97,191	9,499	59,427	-------
...ves	7,323,083	5,080,380	1,449,905	219,043	573,755	-------
...and varnishes	5,782,533	1,185,921	38,741	196,014	167,190	1,788,567
	1/					8/
...ay and Glass Products	417,408,249	339,781,673	7,288,156	15,949,440	16,690,495	37,698,285
...e products, n.e.c.	95,428	93,884	41	686	817	-------
...hollow tile and other clay products	29,244,307	20,839,472	379,589	854,117	597,695	6,573,434
	175,754,801	144,848,406	4,135,472	6,573,829	10,303,067	9,893,027
...e products	36,415,877	26,642,597	1,948,406	621,704	1,068,955	6,134,215
... stone	51,929,385	43,042,904	44,868	2,354,937	1,261,520	5,225,156
	1,662,085	1,495,803	3,159	117,391	45,732	-------
	284,754	238,253	8,981	5,545	11,875	-------
...granite, slate and other stone products	23,076,362	20,727,363	145,278	1,160,319	1,043,402	-------
...s and earths, ground or otherwise treated	140,899	124,573	------	7,583	8,743	-------
...d gravel	86,639,581	73,881,530	603,179	3,636,381	1,930,870	6,387,621
...floor and wall, and terrazzo	3,701,832	3,292,255	9,143	185,642	214,792	-------
...aster, wall board, insulating board and floor composition	4,998,106	4,554,833	9,080	231,206	203,087	-------
	7/					7/
...d Steel and their Products, not including Machinery:	386,678,626	301,114,586	29,617,613	21,412,186	11,907,363	22,620,878
...nuts, washers, etc.	4,080,632	3,629,479	12,644	221,594	216,915	-------
...ron pipe and fittings	36,476,336	27,169,693	498,594	375,482	627,964	7,804,601
...shutters, window sash & frames, molding & trim(metal)	9,589,068	8,729,644	15,950	1,030,978	112,596	-------
...ne	813,468	813,468	------	------	------	-------
...gs, iron and steel	7,509,703	6,078,762	13,413	3,125,424	292,104	-------
...re, miscellaneous	10,019,866	7,810,545	988,982	513,004	707,335	-------
...g and ventilating equipment	19,645,393	17,411,821	100,386	919,153	382,887	831,146
...nd spikes	1,554,683	1,338,743	2,352	62,888	150,700	-------
...enings, excluding spikes	6,576,729	6,564,340	------	9,044	3,345	-------
... steel	21,964,061	21,857,056	50,383	16,838	39,786	-------
..., steel	619,824	619,671	------	102	51	-------
...works and rolling mill products, n.e.c.	102,165,609	74,014,041	20,378,410	5,824,045	1,949,113	-------
...and ranges, other than electric	379,616	376,407	------	732	2,477	-------
...rod and reinforcing steel	134,463,133	108,303,801	4,990,060	10,236,713	4,859,336	6,073,223
...s, railway	771,549	768,619	------	------	2,930	-------
...other than machine tools	10,626,881	5,505,841	97,342	259,219	1,094,869	3,669,010
...ducts, n.e.c.	10,873,605	6,623,139	8,469,197	734,405	1,046,864	-------
... pipe	3,000,812	1,499,963	------	82,465	418,684	-------
						9/
...s Metals and their Products:	10,374,999	6,444,864	2,180,792	874,920	674,883	-------
...manufactures	409,169	328,190	116	80,787	96	-------
...products	3,118,099	805,069	2,196,894	193,852	22,284	-------
...ducts	331,488	315,977	1,790	72,366	1,355	-------
...rmetal alloys and products, n.e.c.	1,[illegible],919	1,839,748	13	288,416	11,735	-------
...tal work	3,388,985	3,401,000	82,079	246,479	699,369	-------
...ducts	60,299	60,280	------	80	48	-------

including Transportation Equipment	264,511,426	222,148,879	6,057,909	23,490,436	8,917,983	3,896,259
chinery, apparatus, and supplies	64,688,423	54,953,721	1,628,931	4,867,734	1,422,901	1,815,136
elevator equipment	3,012,605	2,606,899	4,946	361,518	39,242	----------
ines, tractors, and waterwheels	29,809,874	20,185,335	----------	7,878,989	1,745,550	----------
achine shop products, n.e.c.	139,890,391	120,159,249	4,375,862	8,280,318	5,216,799	1,857,963
	7,130,185	6,719,807	2,128	286,256	121,994	----------
ater,etc.) and gas generators	805,452	803,603	----------	260	1,589	----------
ining equipment	17,661,903	15,508,902	46,042	1,739,772	367,187	----------
s and refrigerating and ice-making apparatus	1,289,633	1,211,363	----------	75,589	2,681	----------
Equipment, Air, Land and Water:	88,397,690	86,793,886	151,778	83,380	1,321,143	47,503
)	5,764,705	5,764,705	----------	----------	----------	----------
s	5,086,400	5,086,400	----------	----------	----------	----------
and wooden (small)	1,407,681	1,376,365	----------	4,758	26,558	----------
wheels	55,020	34,242	----------	3,160	17,618	----------
other than steam	11,818,333	11,818,333	----------	----------	----------	----------
steam	6,856,914	6,837,076	----------	----------	19,838	----------
nd parts	274,395	274,395	----------	----------	----------	----------
s, passenger	563,406	525,657	----------	1,911	35,838	----------
s, trucks	10,600,727	9,107,504	151,778	73,551	1,220,391	47,503
, freight	36,647,366	36,646,466	----------	----------	900	----------
mail and express	429,443	429,443	----------	----------	----------	----------
passenger	8,893,300	8,893,300	----------	----------	----------	----------
	194,525,139	146,295,689	3,389,195	10,669,557	11,091,834	23,078,864
ellaneous	37,212	35,233	----------	815	1,164	----------
	2,385,188	1,179,694	53,384	321,296	220,814	----------
	544,066	543,551	----------	325	190	----------
ng and fixtures	15,103,824	12,830,497	59,795	1,419,222	794,310	----------
cluding store and office fixtures	6,760,987	5,412,439	3,108	131,059	199,722	1,014,659
professional and scientific	2,085,183	1,988,929	----------	54,617	41,637	----------
d bed springs	89,690	88,863	----------	205	622	----------
tterns	29,038	27,115	----------	1,335	588	----------
s	86,962	81,772	93	650	4,447	----------
als and mixtures, n.e.c.	28,247,092	17,726,426	38,077	1,050,596	640,780	8,789,213
ducts	44,986,692	36,038,863	747,240	3,552,906	2,693,979	1,953,704
apparatus and materials	254,090	217,188	815	4,813	31,274	----------
plies n.e.c.	16,726,392	14,152,434	254,918	688,114	696,783	934,143
ue and supplies	1,004,442	946,918	----------	----------	57,524	----------
ials, n.e.c.	5,289,809	4,582,842	6,714	308,468	391,785	----------
	811,558	591,170	94,513	12,408	113,467	----------
er packing, pipe and boiler covering, and gaskets	1,394,080	1,239,821	70,511	52,212	31,536	----------
stery and stage equipment	70,626	70,626	----------	----------	----------	----------
and fixtures	216,516	209,533	----------	91	6,892	----------
ls	68,401,692	47,719,775	2,060,027	3,070,415	5,164,320	10,387,155

value of material orders placed on P.W.A. projects financed from the Emergency Relief Appropriation Act of 1935.
material orders placed on projects financed from R. F. C. loans from March 15, 1934 to March 15, 1936. Includes R.F.C. Mortgage Company projects.
material orders placed on projects financed from E.C.A. from July 1, 1934 to March 15, 1936.
material orders placed on P.W.A. projects financed from E.R.A.A. 1935 funds, included under P.W.A.
material orders placed from beginning of program to March 31, 1936.
in "Other Materials".
materials for projects operated by the W.P.A. which are not classified in detail.
materials in this group which are not classified in detail.

VALUE OF ORDERS PLACED

Type of Mater
All Materials
Textiles and their products:
Awnings, tents, canvas, etc.
Carpets and rugs
Cordage and twine
Cotton goods
Felt goods
Jute goods
Linoleum
Sacks and bags
Upholstering materials, n.e.c.
Waste
Forest Products:
Cork products
Lumber and timber products, n.e.c.
Planing mill products
Window and door screens and weath
Chemicals and Allied Products:
Ammunition and related products
Chemicals, miscellaneous
Compressed and liquified gases
Explosives
Paints and varnishes
Stone, Clay and Glass Products
Asbestos products, n.e.c.
Brick, hollow tile and other clay
Cement
Concrete products
Crushed stone
Glass
Lime
Marble, granite, slate and other s
Minerals and earths, ground or et
Sand and gravel
Tiling, floor and wall, and terra
Wall plaster, wall board, insulatin
Iron and Steel and their Products
Bolts, nuts, washers, etc.
Cast iron pipe and fittings
Doors, shutters, window sash & fr
Firearms
Forgings, iron and steel
Hardware, miscellaneous
Heating and ventilating equipmen
Nails and spikes
Nail fastenings, excluding spike
Rails, steel
Springs, steel
Steel works and rolling mill pro
Stoves and ranges, other than el
Structural and reinforcing steel
Switches, railway
Tools, other than machine tools
Wire products, n.e.c.
Wrought pipe
Nonferrous Metals and their Produc
Aluminum manufactures
Copper products
Lead products
Nonferrous-metal alloys and prod
Sheet-metal work
Zinc products
Machinery, not including Transportation
Electrical machinery, apparatus, and
Elevators and elevator equipment
Engines, turbines, tractors, and wat
Foundry and machine shop products, n.
Machine tools
Motors (gas, water, etc.) and gas power
Pumps and pumping equipment
Refrigeration and cooling equipment

Machinery, not including Transportation Equip
Electrical machinery, apparatus, and supplie
Elevators and elevator equipment
Engines, turbines, tractors, and waterwheels
Foundry and machine shop products, n.e.c.
Machine tools
Meters (gas, water, etc.) and gas generators
Pumps and pumping equipment
Refrigerators and refrigerating and ice-maki

Transportation Equipment, Air, Land and Water
Aircraft (new)
Airplane parts
Boats, steel and wooden (small)
Carriages and wagons
Locomotives, other than steam
Locomotives, steam
Motorcycles and parts
Motor vehicles, passenger
Motor vehicles, trucks
Railway cars, freight
Railway cars, mail and express
Railway cars, passenger

Miscellaneous:
Belting, miscellaneous
Coal
Creosote
Electric wiring and fixtures
Furniture, including store and office fixtur
Instruments, professional and scientific
Mattresses and bed springs
Models and patterns
Paper products
Paving materials and mixtures, n.e.c.
Petroleum products
Photographic apparatus and materials
Plumbing supplies n.e.c.
Radio apparatus and supplies
Roofing materials, n.e.c.
Rubber goods
Steam and other packing, pipe and boiler cov
Theatrical scenery and stage equipment
Window shades and fixtures
Other materials

1/ Includes value of material orders placed
2/ Value of material orders placed on proje
3/ Value of material orders placed on proje
4/ Value of material orders placed on P.W.A
5/ Value of material orders placed from bo
6/ Included in "Other Materials".
7/ Includes materials for projects operate
8/ Includes materials in this group which

699 I have been given by the Public Works Administration a list of the completed municipal power projects which involve the construction of new plants or complete plants, and I have computed the amount spent for labor and materials on those projects.

Whereupon a table entitled "Brief Summary of the Economic Effect of PWA Expenditures for Diesel and Steam Power and Light Plants" was received in evidence as Defendants' Exhibit No. 16, as follows:—

Prepared in the Bureau of Labor Statistics
Division of Construction and Public Employment

A BRIEF SUMMARY OF THE ECONOMIC EFFECT OF P.W.A. EXPENDITURES FOR DIESEL AND STEAM POWER AND LIGHT PLANTS

Scope:
6 Power and Light Plants Located in
Illinois, Minnesota, Missouri, Ohio,
Oklahoma and Virginia

-o-

Total contract prices—$529,262.00

Ratio of labor and material costs:

Labor	$61,046.00	13.2%
Material	400,582.00	86.7%
Total	$461,628.00	

Ratio of labor, materials, and profit and overhead costs:

Labor	$61,046.00	11.5%
Material	400,582.00	75.7%
Profit and overhead	67,634.00	12.8%
Total	$529,262.00	

Man-hours of labor created—

At the site	85,529	18.4%
In factories, mines and transportation	380,000	81.6%
Total	465,529	

For every man-hour worked at the site, 4.4 were created in factories, mines and transportation.

Cost per man-hour, based on contract price	$1.137
Cost per man-hour, based on labor and material	0.992
Average earnings of wage earners employed at site	0.714

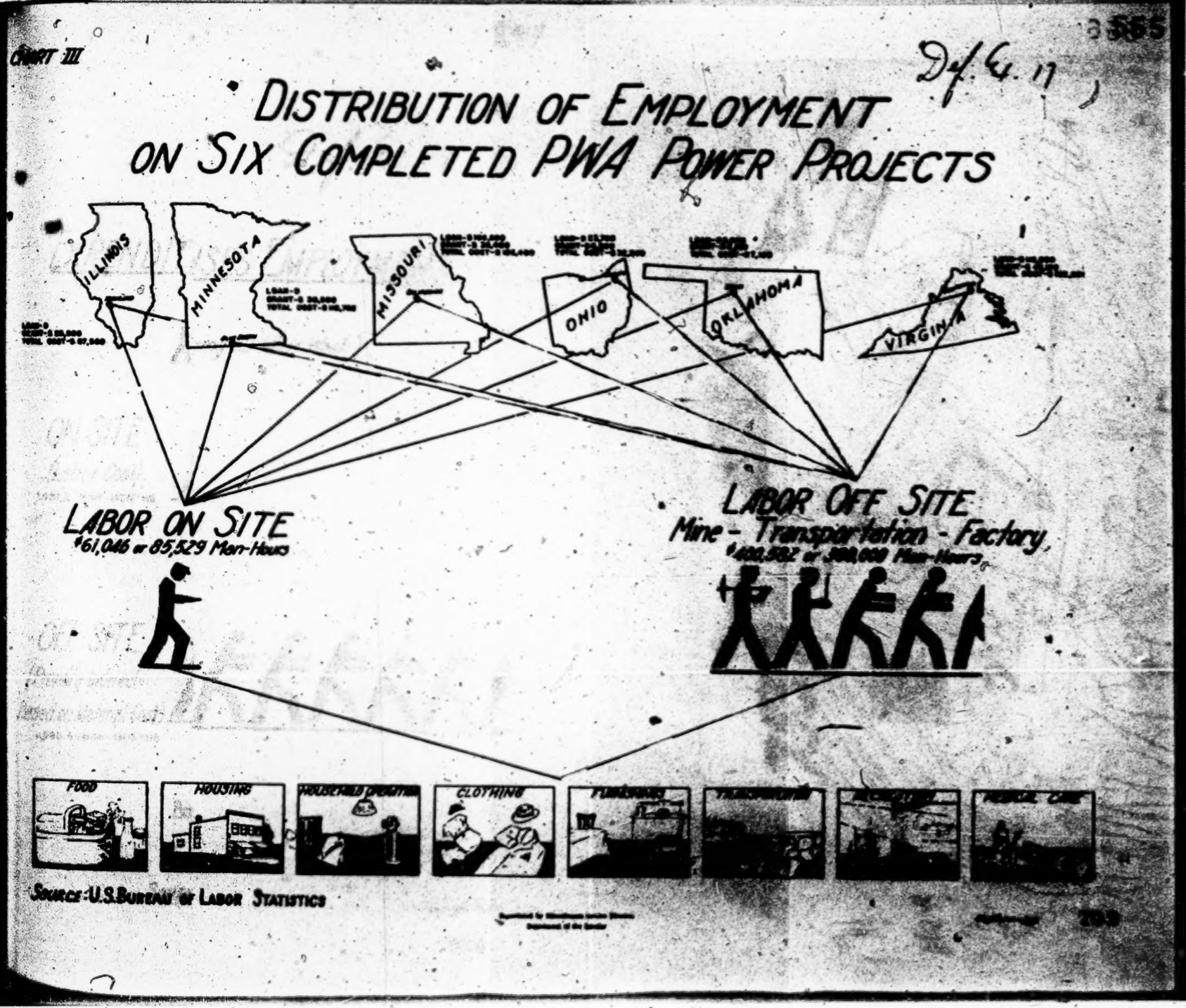
700 The type of projects referred to in Defendants' Exhibit 16 were four Diesel plants and two steam plants. They are all municipal electric light plants.

On these six projects $461,628 were spent for labor and material—that is on labor at the site, and on materials to be used at the site. Labor at the site therefore accounted for 13.2 per cent only of this total expenditure for labor and materials, and materials accounted for 86.7 per cent. At the site, from the reports received by the Bureau from contractors and subcontractors working on these projects, there were 85,529 man-hours of labor created.

There were approximately 380,000 man-hours of indirect labor created away from the site in fabricating and transporting and mining these materials. Labor at the site accounted for 18.4 per cent of the total labor created. And indirect labor amounted to 81.6 per cent. For every man-hour created at the site, there were 4.4 man-hours created indirectly.

Whereupon a chart entitled "Distribution of Employment on 6 Completed PWA Power Projects" was marked Defendants' Exhibit No. 17 for identification.

Defendant's Exhibit No. 17, for identification, shows in graphic form practically the same information that was shown in the table previously offered. It shows the location of the power plants, the two steam plants being in Illinois and Minnesota, the other four being Diesel plants. It shows the total man-hours, the amount spent for labor at the site, $61,000, and the number of man-hours of labor created at the site. It shows the off-site labor. And the figures on the right hand side of the chart, under the heading "Labor Off the Site" show roughly the amount of labor in mining, transporting and fabricating the materials. The blue figure with the pick over his shoulder is



$ 1,000,000

Def. Ex. 18

EXPENDITURE FOR LABOR & MATERIALS WHICH CAUSES EMPLOYMENT:

Each complete figure represents 50,000 Man-Hours (400 Man-Months using 30 Hour Week)

ON SITE
(Labor Cost)
1,482.2 MAN-MONTHS

OFF SITE
(Primary Indirect
Based on Material Cost)
6,585.4 MAN-MONTHS

981.5 994.4 4,629.5

Based on figures derived from Six Completed P.W.A. Power Projects

SOURCE: U.S. BUREAU OF LABOR STATISTICS

—Mary E. Spear—8.13—

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Department of the Interior

supposed to represent a miner; and the orange-
701 colored figure with the oil can in his hand, a transportation employee; and the green figures, employees in factories fabricating materials. The drawings at the bottom show what the laborer spent his money for. We make no attempt to show in what proportion he spent his money for these materials, although we have that. But we do not have it for these particular employees.

But it shows, for example, that labor buys food, housing, spent money for telephones, refrigerators, laundry, for clothing, for furnishings, for transportation, for recreation, and for medical care. And of course when he buys those things, it gives employment to people who are producing and selling those goods.

Whereupon Defendants' Exhibit No. 17 for identification was received in evidence as follows:

(Here follows photostat marked page 702.)

703 Whereupon chart similar to Defendants' Exhibit No. 17, predicated upon expenditure of one million dollars for the erection of power plants, was thereupon marked Defendants' Exhibit No. 18 for identification.

Defendants' Exhibit 18 is an attempt to reason from the particular to the general, in that if we had a million dollars to spend for the erection of power plants—we just took a million dollars, because it is a round figure, and you can multiply it by any number you want to, to get the total power-plant program: If those six plants are typical, this is what would happen if you spent a million dollars for the erection of power plants.

Whereupon Defendants' Exhibit 18 for identification was received in evidence over objection by counsel for plaintiffs and an exception noted.

(Here follows photostat marked page 704.)

705 This chart just assumes that if the proportions for any power plants of a similar nature, that you were to spend a million dollars for, followed the same lines as those six plants did, that the ratio of material and labor, on the expenditure of a million dollars, would follow the

same lines; for every million dollars spent for material and labor, there would be 1,482 man-months of labor created at the site, and 6,585 man-months of labor created in mining, transporting and fabricating the materials used in the construction of those plants. This indirect labor would be distributed to mining approximately 960 man-months; transportation, approximately 994 man-months, and to fabrication approximately 4,630 man-months. That is based on the man-months using the 30-hour week. The conclusion as to how many man-hours of labor are created by a specified amount of expenditure for materials is reached as follows:

When contractors send in their reports to us, they show the amount of money spent for each of the different types of materials. That was brought out in Defendants' Exhibit 15.

Now, there has been a great deal of talk about indirect labor. And many people wanted knowledge as to what happened when the Government was financing construction projects. And we have very accurate information regarding the labor created at the site, from the report of these contractors. We then wanted some information as to the effect of the Government's construction program, in mines and factories.

I will take this report as typical of what we did in the steel industry (indicating a paper). In order to get information regarding labor created in steel mills and, back of that, in mines, we went to representative steel concerns throughout the United States and found out just what happened when they manufactured a ton of steel. For example, we show that to manufacture a gross ton of pig iron, it creates labor, we shall say, in the Mesabi
706 Range or in the limonite and hematite mines in Alabama; and in mining this ore, the records of the Steel Company showed that on the average the amount of ore needed to create a gross ton of pig iron, provided 1.8 man-hours of employment.

In the coal mines, the coal needed to produce this gross ton of pig iron, provided 2.4 man-hours of employment.

The fluxing materials which were mined, such as limestone, which are mined in various parts of the United

States, and practically all over the United States, provided 0.2 of a man-hour.

In the transporting of that material, there are boats across the Lakes, hauling the ore from the Mesabi Range to the ore docks in various parts of the United States, and there are railroads that transport the iron ore from other parts, where they do not come across the Lakes; and the fluxing materials are transported by rail.

Most of these steel companies have records which show the amount of money spent and the man-hours of labor created.

We show that in transporting the iron ore needed to produce a gross ton of pig iron, that created 2 hours of employment; the transportation of the coal created 1.6 hours, the transportation of the fluxing materials created 0.5 of an hour.

Then the next process is putting that ore in the blast furnace. In blast furnace operations there were 2.3 man-hours created for every gross ton of pig iron produced.

Converting the coal into coke, the coke that is used in the blast furnace, taking an average of new ovens and the old bee-hive type, created 1.2 man-hours of labor.

I did not make similar studies of all of the various industries, but of the principal industries entering into the supplying of materials.

707 Cross examination

Defendants' Exhibits 13 and 14 show the depth of the durable goods depression to have been in March, 1933.

After March 15 the curve starts up and goes on up with fluctuations. The general trend was up.

Defendants' Exhibit 15 includes all purchases for PWA projects, either Federal or non-Federal, used in a construction project. They would not include purchases for desks in the Interior Building, but everything that is used on a construction project.

The proportion of money spent on labor at the site of the steam projects shown on Defendants' Exhibit 17 was almost the same as on the Diesel projects included. The labor at the site was less on the Diesel plants than it was on the steam; that is, the relationship.

The six power and light plants referred to in Exhibit 16 are the same ones that are referred to in Exhibit 17. On Exhibit 17 in each case the amount of total cost means the entire cost of the project to the city, and the amount of that total cost which came from PWA is also shown on Exhibit 17. And the figures shown on Exhibit 16, 529,262, are the total contract price made between the city and whoever built the plant. The ratio of labor on and off site is computed from the figures on Defendants' Exhibit 16.

On Defendants' Exhibit 17 labor on the site is $61,040 and expenditures off the site is put as $400,582. Those are the same figures which are shown on Exhibit 16.

This $400,582 is the amount of money spent for materials —not the amount of money spent for labor off the site. It is spent for materials, and the manufacture and transportation and mining of those materials created
708 380,000 man-hours of labor. But that does not mean that labor was paid all that money. There might have been other things. I have not shown anywhere the amount of money which was paid to labor off the site. On Defendants' Exhibit 16, in the middle of that page, I have ratio of labor, materials, profit and overhead costs. Labor on the site is shown as receiving 11.5 per cent of the contract price. But it would not be 11.5 percent of the total cost of the project. It would, apparently, be a good deal less from those figures on Defendants' Exhibit 17. I am the author of a study produced by the Bureau of Labor Statistics, United States Department of Labor, entitled "Relative cost of Material and Labor in PWA Construction" relating to building and water and sewerage construction. That was a study of the relative cost of labor off the site and of materials on P.W.A. projects which involved building and which involved water construction and sewerage construction. In that study I found that in P.W.A. building construction, labor on the job received 27 cents out of every dollar. That was an average figure. The lowest being 12 per cent on a machine job in California, and the highest 49 per cent on a school house in Kentucky. In water and sewerage construction on P.W.A. projects, I found that labor at the site there received 26.3 per cent of the total cost. Those percentages are comparable with my conclusions on the six electric projects, that labor at the

site received 11.5 per cent of the total cost. There was also a study called "Labor and Material Costs involved in the construction of a large apartment building", prepared under my direction as the Chief of the Division of Construction and Public Employment of the Bureau of Labor Statistics. In that study we found that labor at the site received 32.49 percent of the total cost of the project, and that that part of the labor which was engaged in grading and excavation received 43.76 per cent. The proportion of the total cost which goes to direct labor on road work would be higher than on the six P.W.A. elec-
709 tric projects. I think it would be higher on dams, too. My study on labor in the steel industry was the first study which the Bureau of Labor Statistics made on this subject. Before that study there was no reliable information. In that steel study, the Bureau of Labor Statistics stated that in the past there were no reliable criteria on this subject. That study was published by the Bureau of Labor Statistics in May, 1935. Subsequent to that, in the Monthly Labor Review for March, 1936, there was a similar study made in the cement industry. In the steel study, and in the cement study, we brought out the fact that the number of man-hours which might be involved in manufacturing may vary considerably with the process used by a particular company. In all these industries there may be considerable variation depending on what type of equipment a manufacturer had. Then in the cement study we pointed out that another variable came from the rate of operation. Whether the plant was operating at 20, 40, 60, 80 or 100 per cent; there might be a tremendous variation in cement. More man-hours are created roughly speaking, in a plant that is operating at a small proportion of its time, than in a plant that is operating near capacity. Then there is another variable which enters into this, and that depends not on the rate at which the plant is operating, but the total capacity of the plant. In other words, a large plant, in order to turn out a given quota of work, may employ less man-hours than a very small plant because they usually have better equipment, more up-to-date equipment. So all of these three items, variations due to manufacturing processes, variations due to rate of operation and variations due to plant capacity, introduce an unknown element

in any given situation. In any general study, all one can do is to take averages. There is one other variable due to the location of the plant. I do not mean to infer that that is because of geography. It is probably because of
710 - other conditions; but it remains that plants in some sections do create more labor than others.

In these particular studies which I made here of the six P.W.A. projects, I did not go to the particular plant that produced the steel or cement. We simply took a general average; we knew the rate of capacity at which steel mills generally were operating at that time, but not the rate at which those particular plants were operating. So that the most that I wish to say about this particular study is that I have applied general principles to it; the actual man-hours of indirect labor might vary from the figures shown on Defendants' Exhibit 17; the man-hours at the site would not vary. In addition to these studies of steel and cement, we are making studies in the machinery and lumber industries. They are not wholly completed yet. Conclusions drawn from them are subject to check. In addition we have a number of incomplete studies of others which are arrived at in a different manner from these other studies. That is, when a manufacturing concern gets an order that is financed from Federal funds we send him a form and ask him how much labor is created in his plant in manufacturing that order. So that our men have not actually gone out to take the cost records off the books. but we have his replies, and I have used those also. I cannot say that the employment either on the site or off the site, shown on Defendants' Exhibits 16 or 17 or 18, is employment of theretofore unemployed persons. We can say that that is the man-hours of labor created. I have seen, or read, economic theories which hold that all costs of everything go to labor sooner or later. It certainly is not my theory. I indicated on Defendants' Exhibit 17 that in addition to employment off site there is further employment from the purchase of materials illustrated at the bottom, such as food, clothing, etc. You would not have to let your imagination run particularly to say that the employment
711 created was far more than the amount spent on this project. You would if you said everything went to labor; but how does the entrepreneur pile up his surplus

in the bank. There has to be imagination in any work, any creative work; there must be imagination. There is not imagination in the part of this study that shows the direct and indirect labor. The part that is conveyed by those pictures at the bottom, yes.

In these various graphic presentations where we have the little figures representing man-hours, a man-month means four and one-half 30-hour weeks.

Redirect examination

Counsel on cross-examination referred to the variations due to separate plants. We did not take those into account in the calculations, because, as I say, we did not trace these materials back to any given plant. That would probably be impossible. Steel, of course, is the largest item—steel and machinery. But we did take into consideration the variation in general plant capacity as shown at the particular period in which the orders were placed. In making calculations on a large scale there is a tendency, I suppose, for variables to balance or offset each other to a certain extent. I think that is true. There is a tendency. I was interrogated on cross examination in reference to studies of labor costs on certain projects on which it appeared that the labor created at the site, represented a somewhat greater percentage of expenditure than on some of the projects here involved.

It is true that if the proportion of money spent for labor at the site was larger, the money spent for material must have been smaller. I can say there was more money spent for materials on the six electric projects which I studied. We have not traced back the materials to find out whether there was more indirect labor, but reason would in-
712 dicate that if you spent more money for materials, it would create more labor. I could not be absolutely definite, of course.

713 Whereupon there were received in evidence as defendants' exhibits 19 to 22, inclusive, certain Executive Orders of the President as follows:

Defendants' Exhibit 19.

ADMINISTRATION OF PUBLIC WORK

Pursuant to the authority of "AN ACT To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

The White House
July 8, 1933.

Defendants' Exhibit 20.

Authorizing the Federal Emergency Administration of Public Works to Continue to Perform Functions under Title II of the National Industrial Recovery Act and to Perform Functions under the Emergency Relief Appropriation Act of 1935.

Pursuant to the authority vested in me by the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Public Resolution No. 11, 74th Congress), I hereby authorize the Federal Emergency Administration of Public Works, under the Federal Emergency Administrator of Public Works:

(a) to continue after June 16, 1935, to perform all of the functions which it was authorized to perform prior to June 16, 1935, under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200);

(b) subject to the rules and regulations heretofore and hereafter prescribed by the President to carry out the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, to perform the following functions under said Act:

(1) make loans or grants, or both, for projects of states, territories, possessions, including subdivisions and agencies thereof, municipalities and the District of Co-
714 lumbia, and self-liquidating projects of public bodies thereof, where, in the determination of the

President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular project;

(2) carry out projects for slum-clearance or low-cost housing, or both;

(c) to sell any securities acquired under Title II of the National Industrial Recovery Act, approved June 16, 1933, or under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and all moneys realized from such sales shall be available for the making of further loans under the said Title II of the National Industrial Recovery Act or the said Emergency Relief Appropriation Act of 1935, in the performance of the functions herein authorized.

To the extent necessary to carry out the provisions of this Executive Order, the Administrator is authorized to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

(Paragraph relating to personnel omitted.)

The unobligated balances on June 30, 1935, of allotments of funds made pursuant to Title II of the National Industrial Recovery Act, approved June 16, 1933, to departments and agencies of the Government which continue to exist after June 16, 1935, for the performance of functions of the Federal Emergency Administration of Public Works, are hereby reallocated for use by said departments and agencies, respectively, after June 30, 1935, for the purposes for which originally allocated thereto: Provided That upon completion of the project or work any unexpended balances of the aforesaid reallocations shall be reported by the departments or agencies concerned to the Secretary of the Treasury who will cause such balances to be placed to the credit of the appropriations from which said allotments were made.

FRANKLIN D. ROOSEVELT

The White House
June 7, 1935.

715 *Defendants' Exhibit 21.*

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

A. Delegation of Functions and Powers.

Pursuant to the authority vested in me by section 201(a) of the National Industrial Recovery Act, approved June 16, 1933, I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities, and tenure.

2. Under the conditions prescribed in section 203 of said Act, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act; upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

3. In deciding to extend any aid or grant to any State, county, or municipality, to consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof.

4. In his discretion, and under such terms as he may prescribe, to extend any of the benefits of Title II of said Act to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

B. Regulations.

Pursuant to the authority vested in me by section 209 of the National Industrial Recovery Act I hereby prescribe the following rules and regulations as necessary to carry out the purposes of Title II of said Act:

1. No convict labor shall be employed on any project constructed in whole or in part under the provisions of Title II of said Act. No materials manufactured or produced by convict labor shall be used on any such project.

2. No contractor or sub-contractor on any such project who is subject to a code adopted pursuant to Title I of said Act shall permit any employee to work in excess of the hours of labor prescribed in said code. No other contractor or sub-contractor shall permit any employee to work more than 30 hours in any one week, except by authority of the Administrator; provided that working time lost in any week because of inclement
716 weather or unavoidable delay may be worked within the succeeding 20 days; provided further, that in localities where a sufficient amount of labor is unavailable in the immediate vicinity of the project a maximum of 130 hours of labor in any calendar month may be authorized by the Administrator; provided further, that in localities so remote and inaccessible that employees must be housed in camps the Administrator may authorize labor not to exceed 8 hours in any one day and 40 hours in any one week.

3. No employee on any such project shall be paid less than a just and reasonable wage which shall be compensation sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. All such wages shall be paid in lawful money of the United States, in the full amount earned by each individual at the time of payment, not less often than once each week, and without deduction on account of goods purchased, rent, or other obligations which obligations shall be subject to collection only by legal process.

4. Each contractor or sub-contractor on any such project shall post in a prominent and easily accessible place at the site of the work a legible statement of all wage rates paid.

5. Should it appear that any individual employed on any such project has been or is being paid less than hereinbe-

fore prescribed, the Administrator shall notify the employer of such individual to pay him all wages due according to the prescribed rate. Upon 10 days default on the part of such employer he shall be liable to the penalties provided in said Act for violation of these regulations.

6. Any violation of these rules and regulations may be notified by the Administrator to the District Attorney of the appropriate district, who will proceed, if so directed by the Attorney General, to bring a criminal action for such violation.

FRANKLIN D. ROOSEVELT

The White House,
August 19, 1933.

Defendants' Exhibit 22.

DELEGATING CERTAIN FUNCTIONS AND POWERS TO THE FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act and of Title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

2. To alter, amend, or waive any or all rules and
717 regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment

under the said section 209 shall become effective until approved by me.

FRANKLIN D. ROOSEVELT

The White House,
December 26, 1934.

Whereupon the Defendants Rested.

718 *Evidence for the Plaintiffs in Rebuttal.*

D. L. McDonald

was called as a witness on behalf of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination

I live in Amarillo, Texas. My business is water development, water supplies developed from ground-waters or wells. I dig wells. I have put in wells for city water supplies, in the part of Texas where Plainview is situated—all over the Panhandle, in Pampa, Panhandle, Amarillo, Hereford, Clovis—that is in New Mexico—Lubbock, Floydada and Delia. Those are about all the towns in that section of the state that required water supplies. I have been in the business of developing water supplies for cities since 1910, and have put in wells for cities costing something in the neighborhood of $2,000,000.

In August, 1934, I made a bid to the Texas Utilities Company for a new well in Plainview, Texas. There was a drought in Texas in 1934 and the water supply in Plainview was running short. I don't know positively that mine was the lowest bid, but I imagine it was, because it was indicated that I was to do the work. It was a competitive bid. To dig a well in Plainview, Texas, which would be adequate for the city water supply would cost $14,760. That would be a gravel-wall well—a well of large diameter in which the casing is inserted and the space between the casing and the side of the hole is filled with washed, screened gravel. The gravel is used largely to hold formations in place which are inclined to cave or break down—either sand formations or soft clay or shale formations. The geological formation in this part of Texas is largely sand, sand that produces the water. If you just put a pipe down in the ground and begin to pump, those sand formations pump out and leave large

cavities, and very often cave, and you very often lose the well. So you put in gravel to hold the formations in
719 place and prevent cave, and also to control the sand formation.

I have prepared a statement showing the various items of cost in building a well adequate for the city water supply at Plainview, Texas.

Whereupon estimate of cost of construction of well at Plainview, Texas, was marked "Plaintiffs' Exhibit No. 271" and received in evidence.

Plaintiffs' Exhibit No. 271

Plainview, Texas

Cost of Construction of Well Equal to Present Texas Utility Company Water Supply Well

Transportation—Tools		$ 620.00
45 days—12 men @ $60.00 per day		2,700.00
60 ft. of 28" x 3/8" welded casing @ $12.00 a ft.		720.00
280 ft. of 16" byers pipe @ $6.50 a ft.		1,820.00
250 tons screened gravel @ $6.00 a ton		1,500.00
100 ft. Toncan iron strainer		1,723.60
Fuel—gas 45 days @ $10.00 a day		450.00
Tools—45 days @ $10.00 a day		450.00
1 6 Stage 14" L set of pump bowls	$ 568.40	
100 ft. pump column 10" x 3" x 1-11/16"	571.20	
1 100 h.p. 1800 R. P. M. 220—440 volts 60 cycles 3 phase motor with pump head	1786.40	
120' 10" suction pipe	268.80	
1 Green suction strainer	33.60	3,228.40
1 starting switch		128.00
pump base 6' x 6' x 12"		60.00
Developing well		600.00
Brick pump house and steel derrick		760.00
Total		$14,760.00

720 One of the wells at present in use in Plainview Texas is of the type, the cost of which is shown in Plaintiffs' Exhibit 271. The last well installed some six o

seven years ago is of that type. They have two other wells that are not. The wells which I have put in in other cities in this part of Texas are of the type shown on Exhibit 271. This type of well is used for city water supplies in that part of Texas on account of its dependability and efficiency. Nobody has ever lost one of them, and they produce water as long as there is any water in the formation.

I have examined the estimate for a well which was made by Mr. Holbrook showing various items totaling $5,000. That is the kind that is commonly used on a farm for irrigation. It consists principally of a hole cased with light casing and is not strong enough to stand the work of a municipal well. The casing is too light. If you get a cave it is likely to collapse it or break it, and when that happens you usually lose the pump. Ninety days would be quite a long period for pumping irrigation wells. The city water supply well is used continuously. If you use the type of well estimated on by Mr. Holbrook, you will likely lose it through a cave that would collapse the casing and probably lose the pump. That type of well is not used for water supply of a city on account of the danger of that happening. Nearly all cities use the gravel type of well. In my opinion, after the number of years I have spent in this business, the well estimated upon by Mr. Holbrook is not a safe and
721 adequate well for a city water supply. I would not consider it so.

The application of the City of Plainview, Texas, made to the Federal Emergency Administration of Public Works for a loan and grant of $100,000 to build wells in the city of Plainview, in exhibits A and B describes the farm or irrigation type of well. It is not the type of well that I regard as necessary for a city water supply. They have now two of those wells, of a similar type, with much heavier casings. These are 12-inch steel casings, and they do not have the strength to resist pressure from caving formation that you find in those fine water-bearing sand formations. The recent well which was built some years ago in Plainview is the gravel wall type. The well on which I was asked to estimate was to replace the earlier wells. In addition to the cities of this district using gravel wall wells, the railroad companies—I have installed a great many of those for the Santa Fe Railroad Company of the same type. Also for the

oil companies, and the Rock Island Railroad Company—in other words, the large users of water down there invariably use the gravel type of large diameter.

Cross Examination

The farm or irrigation type of well very often break down in process of development. If that happens you have to drill a new well. One difference is that the gravel wall type lasts longer than the farm or irrigation type; and then they are more efficient. Two of the wells now in use at Plainview are rather a cross between the farm or irrigation type and the type I have described, on account of the fact that the casing used is very much heavier than in the irrigation well. Other than the casing they are the same as the irrigation well, just a hole cased with pipe. There is a lot of difference between the cost of this heavier casing and the casing used in the ordinary farm or irrigation type of well. I think you can get 12-inch sheet steel casing for a couple of dollars a foot—200 feet of casing at two dollars a foot
722 would be $400—and the casing we use in this well that I bid on is Beyers wrought iron 16 inch. There is also a string of 28-inch casing used that is set from the surface of the water level. I don't know what the size of the pipe is in the two old wells in Plainview and of course I couldn't tell you the difference in cost. It would not be a very big item. The gravel wall well which I have described will produce a thousand gallons a minute, about a million and a half gallons per day. I think three wells of that type should be used in Plainview. If you used the farm or irrigation type of well, probably the same number would be needed. As far as the quantity of water is concerned, they produce the same amount. The type of well I describe is more efficient and more dependable.

723 *Plaintiffs' Exhibit 272*

Counsel for plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 272 a document dated January 15, 1936, signed "United States of America Federal Emergency Administrator of Public Works by Horatio B. Hackett, Assistant Administrator," in which it was recited that the United States agreed to aid in financing the construction of extensions and additions to a municipally owned

waterworks system in Plainview by making a loan to the City of $55,000 at 4% interest, and a grant of $45,000, the loan to be repaid $2,000 on November 1, in each of the years 1936 to 1940, inclusive, and $3,000 on November 1 in each of the years 1941 to 1955, inclusive.

Plaintiffs' Exhibit 273

Counsel for plaintiffs offered and there was received in evidence as Plaintiffs' Exhibit 273 "Application for Loan and Grant" of the City of Plainview to the Federal Emergency Administration of Public Works, for extensions and additions to an improvement of the water system of the City, attached to which were the following exhibits:

Exhibit "A"

This project will consist of three wells of about 1500 GPM capacity from which water will be pumped by 1500 GPM pumps, motor driven turbine, mounted on concrete bases and protected with brick pump house and steel derrick built integral.

This water will be delivered to a circular, covered, reinforced concrete, surface reservoir, having a capacity of 500,000 gallons from which it will be lifted by means of three 1500 GPM centrifugal motor driven service pumps to a 500,000 gallon steel tank on a 100′ tower and to the distribution system, which will consist of about 1725′ of 12″ cast iron pipe to Quincy St. where it ties into the present system and then 6050′ of 10″ cast iron pipe to Broadway and tie into the present system. There will be included in this project the taking up of 1500′ 8″ line, the taking up of 2250′ 6″ line, relaying 400′ 8″ line, and the relaying of 850′ 6″ line. This system will give fire protection to section of town, which is now penalized by the State Fire Insurance Commission and will give credits, so that Fire Insurance Rates can be reduced over the entire town. Fire Hydrants will be put one block apart and crosses will be put in on every block of line.

All service connections will be of copper and will be metered.

724 Exhibit "B"

Break Down of Cost.

3—1500 GPM wells and pumphouses complete...		$19000.00
3—1500 GPM Service pumps complete and pumphouse		4500.00
1—500,000 Gal. Tank and Tower 100′		30000.00
250—Cu. Yds. Conc. @ $15.00 for base of Elev. Tank		3750.00
1—500,000 Conc. Surface Reservoir		9350.00
1725′—12″ CI Pipe in place	@ $ 2.736—	4720.41
6050′—10″ CI Pipe " "	@ $ 2.168—	13117.96
400′ — 8″ CI Pipe relay	@ $ .5856	234.24
1580′— 8″ " " take up	.50	750.00
2250′— 6″ " " " "	.50	1125.00
850′ — 6″ " " relay	.555+	471.83
8.24 Tons CI Fittings	160.365+	1331.41
12—Hydrants	71.467	957.60
3 —12″ Valves & Boxes	89.95	269.85
10—10″ Valves & Boxes	71.82	718.20
3 — 8″ " "	40.283	120.85
15— 6″ " "	27.683	415.25
Contingencies		12000.00
		92043.00

Lee Schneitter was called as a witness on behalf
725 of the plaintiffs, in rebuttal, and being first duly sworn, testified as follows:

Direct Examination

I live in New York City, and am a Diesel engineer, a branch of mechanical engineering. I was graduated from the University of Missouri with the degree of Mechanical Engineering, in 1920. I have practiced mechanical engineering since that time, all of that time on Diesel engines. After leaving the University I was employed for six months at St. Louis, Missouri, with the DeBusse Diesel Engine Company; from 1920 to 1923 by the Texas Power & Light Company as operator of Diesel plants and maintenance engineer; then in Cuba as supervising engineer in charge of about 25 Diesel plants of the Cuban Electric Company;

in 1925 by the Electric Bond & Share Company, in New York, as Diesel engineer, supervising operation and maintenance of Diesel plants both in the domestic and foreign fields, in Cuba, Mexico, Argentina, Brazil, Ecuador and Colombia. At present I am consulting engineer for a large service company in New York City having clients with Diesel plants totaling about 120,000 horse power. I have had charge of the installation of Diesel plants in Texas, and am familiar with the operation of Diesel plants there. I am familiar with the Diesel engines proposed to be installed in Plainview, Texas, and with the expected life and the expected kilowatt hours generated by them. Useful or economic life means the period through which the engine will give active service and during which period we should charge off the cost of the equipment. A conservative or prudent period for a municipal plant would be a ten or twelve-year period, not exceeding at the maximum a 15-
year period. In an industrial plant the life would be
726 —the economic or useful life would be much less,
probably about five or six years. The factors which limit the useful life of a Diesel engine at the present time would be the cost of fuel; inadequacy; obsolescence; and the lower price of Diesels, improvements that are made from time to time, as those are factors which might in time cause an existing engine to become uneconomic. By cost of fuel, I mean the rising cost of fuel. By inadequacy I mean inability to generate the necessary kilowatt hours. In estimating the costs of maintenance on a plant that is not yet in operation, I have a number of records of plants that have operated for ten years or more; but the maintenance which I refer to now is running maintenance. It does not include any depreciation charges and would be figured on the material and labor required to keep all of the equipment in good running condition. For a plant of the size and with the load conditions as set down for the Plainview municipal plant, I estimate that the labor for maintenance will average 2,500 to 3,500 man-hours per year. Taking that at a cost of about 80 cents per man-hour we have a cost of $2,400 a year average for labor maintenance. Materials for the engines referred to will cost from $2,000 to $5,000 a year. Of course their maintenance is not a fixed amount in any one year. It varies. There will be periods

of years of high maintenance and others of mean or average maintenance. The materials I estimate at an average cost of $3,500 a year, making a total for materials and labor of $5,900. Maintenance is dependent on geographic location of an engine. It is different in one part of the country from what it is in another. The figures which I have estimated are based on conditions in Texas. The outstanding conditions in Texas which differ from other sections are high temperature conditions and sand storms.

Cross Examination

In answer to a question on direct examination about the useful life of a Diesel engine, I stated that a con-
727 servative estimate would be ten or twelve years in a municipal plant. By "municipal plant" I mean a plant either privately or publicly owned which is supplying electricity to a municipality. After the period of useful life I have referred to, the plant can still be used, but it cannot be used to as high a degree of efficiency as during its period of useful life. I do not mean to say that the plant just falls apart at the end of ten or twelve years. A progressive company would discard the old one and put in a new one. It is true that a great many privately-owned utility companies do operate Diesel engines for longer periods than 15 years. I know of very few that are operated as long as 20 or 21 years. They are not the principal operating units in the station. When they get to the age of 15 years, then they are relegated to stand-by service, and they get very little operation. They are really discarded, but probably maintained and kept for stand-by purposes. There are engines running that are 15 years of age; but there are few that are older than 15 years, that I know of. There may be special conditions where an engine might be continued in service after a 15-year period, but for safety and prudence one would charge off an engine that is 10 or 12 or 15 years old—not over a 15-years period at the maximum if you are a prudent operator. The life of the plants will vary from 8 years to 15 years, something like that. I stated that among the factors that go to end the useful life of a plant were fuel, inadequacy, obsolescence. By "obsolescence" I mean that there are new types of engines developed that should be used. And by "Inadequacy" I mean

that more current is being sold than can be supplied by the plant that is in use. If there were no improvement in the art during the next 15 years and if the proposed municipal plant in Plainview were adequate to supply the needs of the community at the end of that period, there might not
728 be any need then for a new Diesel plant; but I don't think we can assume that there is going to be no improvement in the art, because if we look back over the last ten years we will see a big improvement in Diesel engines. There will be improvements in the next ten years. I know engines being sold at the present time with a fuel consumption of about .4 of a pound per brake horsepower hour. There are developments going on in Europe and reports that the fuel consumption is as low as .33 of a pound of oil per brake horse-power hour. So there is research; there is more research going on in the Diesel field at the present time than there is in any other industry. In my estimate of expected life, I consider the wear on the engine as well as those factors I mentioned, and good engineering practice. If you follow a prudent course of writing off the plant equipment, a 15-year life would be a maximum period to assume.

N. T. Veach, Jr., a witness previously called and
729 sworn, was recalled in rebuttal and testified as follows:

Direct Examination

The first item on Plaintiffs' Exhibit 63 in which there was a difference between Mr. Harley's estimate and mine was the item of clerical help in the office. I have figured $2,400, and Mr. Harley's estimate was $1,600. It is customary in the smaller cities owning municipal utilities to have the city clerk's office handle the office end of the utility operation. In my estimate I assumed that the City of Plainview would follow the same practice, and that the only additional labor or help would be that of clerks, bookkeepers, storekeepers, and so forth. I figured that there would be at least three additional people needed, and that probably a budget of $2,400 would be sufficient to employ that help.

The next item in which there was a difference was for a solicitor of new business. It was my intention that this item might or might not be taken as representing the salary of any one person, but rather as the cost of soliciting new

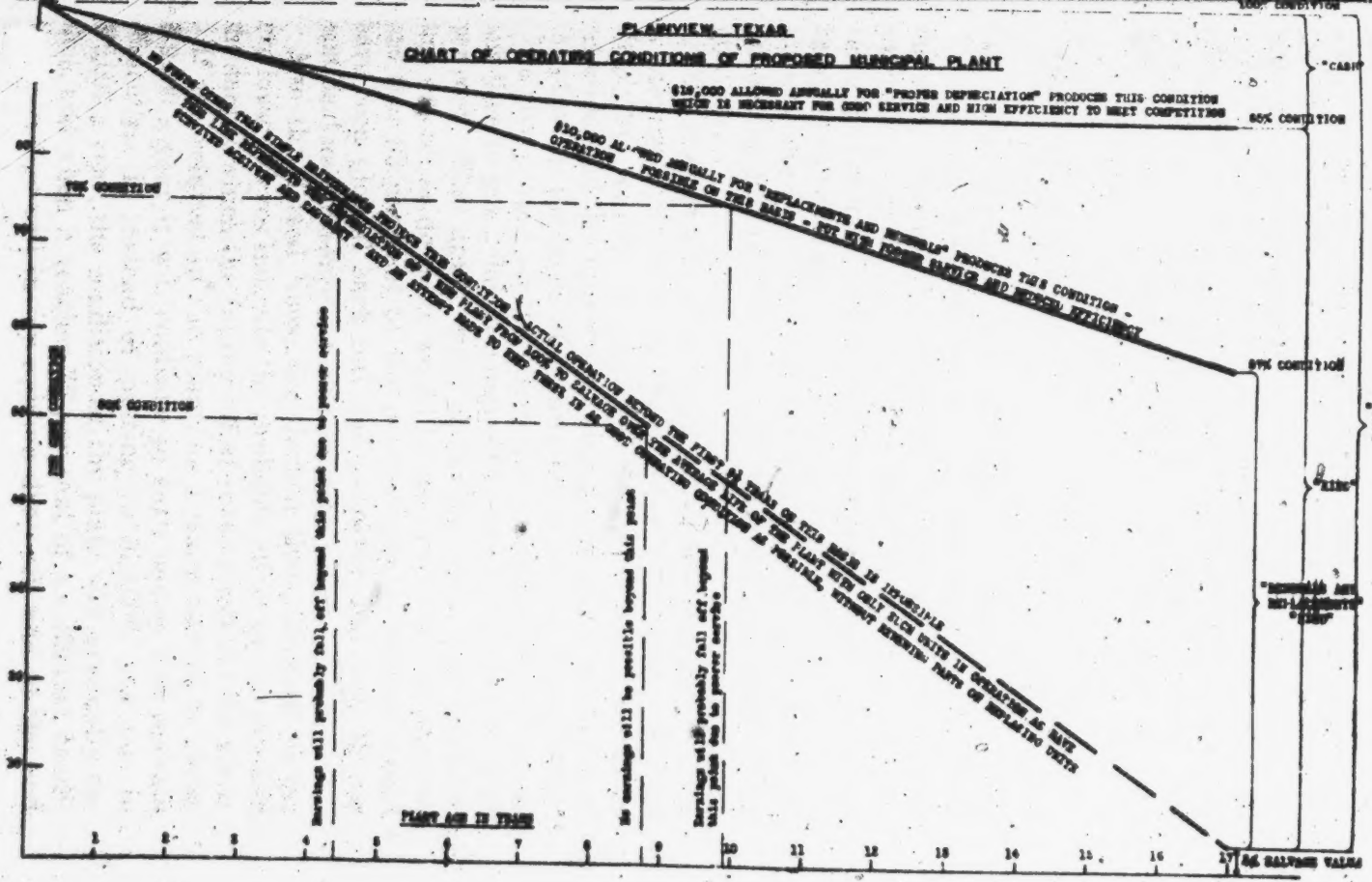
business. It seemed inconceivable to me that a plant competing with an active company giving good service could expect to get its share of the business without active solicitation. Therefore the estimate of $1,200.

The next difference is on line assistants. Mr. Harley said he had one lineman and one ground man. My estimate is based on two linemen at the salary paid linemen in that vicinity. It is my opinion that both of the men making up the crew should be capable of doing line duty. The amount was $2400, a hundred dollars a month apiece for each lineman. My estimate was based on going wages in Plainview.

On the plant maintenance item I have $5,100. Mr. Harley's estimate was $3,500. Mine was made up of
730 $2,400 for labor and $2,700 for material. On the basis of the probable output of the proposed plant at Plainview this represents a cost of 2.38 mills per kilowatt hour. This is checked by actual operating data taken from the company's plant at Plainview, which is a 1,600 kilowatt capacity plant as compared with 1,500 capacity as proposed by the city, and the records cover a seven year period. The per kilowatt hour costs of maintenance in this plant vary over that period from 3.83 mills per kilowatt hour, when the output was a little over two million kilowatt hours per year, to 1.04 mills when the out put had increased to about 8,000,000 kilowatt hours.

A study of these data indicates that a reasonable cost for the plant at Plainview as proposed by the city would be three and a half mills. That compares with the figure estimated by me which amounts to 2.38 mills per kilowatt hour. It is believed that my figure is conservative, to say the least.

Mr. Harley eliminated $1,000 from commercial expense. My total amount for commercial expense of $2,550 is on the basis of the probable number of customers at Plainview, which I have taken as 1,200. The total operating cost shown by my estimate is 3.67 cents per kilowatt hour. I think it is a reasonable operating cost. I have a number of data from plants that have regular running records available. The total cost according to my estimate per customer per year is $32.40 based on 1200 customers, exclusive of debt retirements. In my experience that is normal, and is less than comparable costs in plants operating under simi-


PLAINVIEW, TEXAS
CHART OF OPERATING CONDITIONS OF PROPOSED MUNICIPAL PLANT
$10,000 ALLOWED ANNUALLY FOR "PROPER DEPRECIATION" PRODUCES THIS CONDITION
WHICH IS NECESSARY FOR GOOD SERVICE AND HIGH EFFICIENCY TO MEET COMPETITION
95% CONDITION
$10,000 ALLOWED ANNUALLY FOR "REPLACEMENTS AND BETTERMENTS" PRODUCES THIS CONDITION -
OPERATION - PURSUED ON THIS BASIS - WILL KEEP PLANT IN GOOD REPAIR AND HIGHLY EFFICIENT
89% CONDITION
100% CONDITION
80% CONDITION
ACTUAL OPERATION BEYOND THE FIRST 10 YEARS OF THIS CURVE IS IMPOSSIBLE
AVERAGE LIFE OF THE PLANT WITH ONLY SLOW UNITS IN OPERATION AS HAVE
BEEN INSTALLED - AND AS INTENDED WORK TO MEET TIMES IN AN EFFICIENT OPERATION AS POSSIBLE, WITHOUT REMOVING PARTS OR REPLACING UNITS
Savings will probably fall off beyond this point due to power service
No savings will be possible beyond this point
Savings will probably fall off beyond this point due to power service
PLANT AGE IN YEARS
"CASH"
"PROPER DEPRECIATION"
"RING"
"REPLACEMENTS AND BETTERMENTS"
"RESERVE"
AS SALVAGE VALUE

lar conditions. I have prepared in graphic form an explanation of the effect upon the earnings of the plant of the various items of depreciation, renewals and repairs, and ordinary maintenance.

Whereupon a chart prepared by the witness showing the effect upon earnings of various items of depreciation, renewals, repairs and ordinary maintenance, was
731 marked "Plaintiffs' Exhibit No. 274" and received in evidence.

(Here follows photostat marked page 731.)

732 In the first place, the vertical scale shown on the left hand side with the sheet held flat, that is, with the long dimension horizontal, represents the percent condition ranging from zero to 100 per cent. The scale along the botom is the age of the plant in years. The three heavy lines ranging from the upper left hand corner to the three points on the right hand side represent at any time during the life of the plant the physical condition of the property.

With respect to the three plans shown graphically, one is running maintenance; the other a plan where a fund simply to take care of replacements and renewals would be set aside, and the upper one being the physical condition of the plant on the basis of setting aside proper depreciation.

To give proper service the plant should not be allowed at any time to get below a composite physical condition of 85 per cent. That upper curve shows that if proper depreciation was set aside there would be cash equal to 100 per cent and that 85 per cent of the depreciation accretions would have been plowed back into the property and only 15 per cent held as a reserve for emergencies.

Also the dotted lines, the dashed lines, leading to the two lower curves indicate the probable effect on service and the date at which the falling off of service would take place.

If you reinvest in the plant, as I claim should be done, $19,000 a year it will continue to earn money and operate efficiently. If instead of putting in $19,000, you put in $10,000 a year, the condition of the plant will gradually decline, and when it reaches 75 per cent of its efficient condition, earnings will in my opinion drop off, and at the end

of the period it will end up at 57 per cent efficiency. If you did not expend the $19,000 or the $10,000, but just had ordinary maintenance, the condition of the plant would be represented by the third black line, and at the end
733 of four and a half years it would reach 75 per cent of efficiency, and earnings would then begin to drop off. And in eight and three-quarter years it would reach 50 per cent efficiency, and it could no longer operate and give good service. As a matter of fact, such condition is impossible because there would be certain elements of the plant that would be wiped out. It is an impossible situation.

Cross Examination

There might be less clerical help needed for the electrical plant and the municipally-owned water system if they were operated together, from one office. I base my estimate on the knowledge that in city-owned plants the clerk's office would handle both the water and the light business. My estimate was based on combined operation.

Q. To bring about that increase of $800, you have an item of $1,800 for soliciting new business. Do you think it is good practice to spend $1,800 to bring about an increase business of $800? A. The soliciting of new business not only will work to get new business but to hold business. A solicitor is a business representative who tries to hold customers and add new customers and have those already on, use more electricity.

I can't speak as to the figures on Plaintiffs' Exhibit 72. I only know that in general in these competing situations it is dog eat dog, a continual fight to keep business on the side of either the private company or the municipal plant, and that either one of them without some money spent for holding the present business and adding new business would not do so well.

Plaintiffs' Exhibit 274 showed that at the end of the loan period, if you set aside $19,000 for depreciation each year the value of the property in cash and kind would be equal to the original cost. I testified that the original cost of plant was $400,000.00. This chart, Plaintiffs' Exhibit 274, applied entirely to the physical plant, and the situa-

734 tion shown there must exist regardless of what is done with bonds or deficits or anything else, if you are going to keep the plant operating properly.

Thereupon **Donald A. Henry** was called as a wit-
735 ness on behalf of the plaintiffs in rebuttal and, having been first duly sworn, was examined and testified as follows:

Direct Examination

In my opinion, the estimates of gross revenues as shown on Defendants' Exhibits 7 and 8 are incorrect for two reasons. In the first place, the starting point is not right, and in the second place the method of calculation was wrong.

Mr. Harley testified that he started with an average revenue in 1935 of, as nearly as I can make out, about somewhere between 4.4 cents a kilowatt-hour and 4.7 cents a kilowatt hour. As an actual fact the revenue collected by Texas Utilities Company, divided in the manner he testified it should be divided, would have produced an average revenue per kilowatt hour for the portion of the business going to the municipality, under his assumptions, of 3.92 cents at the first year, or 1935. In other words, on Mr. Harley's own premises his figures are wrong. The record also shows that his revenue at the fourteenth year is figured on a basis of 4 cents per kilowatt-hour, which is higher than Texas Utilities Company collected in 1935. Thus, it would indicate a higher rate in the year 1950 than we actually have in effect now.

Mr. Harley testified that he had reduced the rate from 4.4 cents in the fourth year, I believe, to 4 cents; whereas, as I say, it should have started at 3.92 cents, and if it were reduced at all, it should be below that at the end of the period.

I do not think it is reasonable to expect that a plant would operate static for 15 years with the same personnel or with the personnel performing equal tasks, during which time the load would increase by the amount shown by Mr. Harley, and not incur additional expenses for labor.

Mr. Harley criticized the item of insurance, which he said went up in my figures, although the value of property went down. The item of insurance included by me is

736 the total of insurance for public liability and property damage, workmen's compensation, and fire and tornado insurance.

It will be noted that on Exhibit 70 I have made certain increases in pay roll over the periods covered there. Workmen's compensation and public liability insurance is based on a rate per $100 of pay roll, so that it naturally increases when pay roll increases. As a matter of fact, in the fourteenth year, as shown on Plaintiffs' Exhibit 70, the total insurance is made up of fire and tornado, $966, as against $1,160 in the first base year.

The amount of money included there for workmen's compensation and public liability and property damage in the fourteenth year is $1,284, based on exactly the same rates per $100 of pay roll as the base year, which shows $920. The sum total of those two charges slightly increases over the period.

Mr. Harley also not only had the item for uncollectible accounts remaining constant for 15 years but reduced to about 40 per cent of the amount which I have shown. He stated that my figure was practically 7 per cent of the gross revenue. That is exactly what it was intended to be, and that is a figure which is shown from experience, where there are two competing plants. The uncollectible accounts under those conditions are tremendously higher than they are where you have one plant. There are very good reasons for that, which might take a while to go into, and I shall not do it unless you want me to. A customer stays as long as he can on one plant without paying the bill, and then he goes to the other.

Cross Examination

In computing my figure of gross revenues for the City plant for the first operating year, I did not include as revenue the cost of pumping water. If the City were to obtain the revenue from pumping, that would not increase my figures for gross revenue by an amount between $11,000
737 and $12,000 per year, because the present revenue which the Texas Utilities Company gets by reason of water pumping is not for the electric current with which that water is pumped, but it is a payment for the water plus the maintenance and depreciation on the equipment

and wells which the Texas Utilities Company owns, plus the cost of current, and the current is somewhere around 40 per cent of that total, I should say, just roughly. I am not testifying as to the terms of any contract, because I don't know what they are; but I do know what the Texas Utilities Company furnishes to the City of Plainview. They furnish them with water; they do not furnish electric current for pumping. I am sure of that. We have meters on them, and the water is measured.

In Defendants' Exhibit 5 which you show me I find what indicates that the company is selling water instead of charging for pumping. That is exactly what it says. It says: "5 cents per 1,000 gallons for the first 15 million gallons of water delivered to the City per month at the present pumping site."

I do not assume that the company would continue to get its revenue from pumping throughout the long period of gross revenue in your figures. I did not include any revenue from pumping for any year in the estimate of probable earnings of the city plant which I prepared, Plaintiffs' Exhibit 72. I did not assume that the Texas Utilities Company would continue to get the revenue from pumping even after the present contract expired. I assumed that the City would not get the revenue from pumping. If it were true that the City did get the revenue from pumping during this entire loan period, I would not have to increase your figures on gross revenues substantially. The cost of supplying that service would be, I think, slightly more than is now paid Texas Utilities, and there would not be a dollar left. In fact, there would be an additional deficit if the City took over that pumping. On my figures the Com-
738 pany is not now losing money. The company can furnish that service cheaper than the city ever can.

If the city plant were to procure 60 per cent of the domestic business instead of 50 per cent, as I testified on a previous occasion, that would increase the revenues by about $5,600. I do not know what the uncollectible accounts of Texas Utilities Company in Plainview are at the present time. I could have gotten those figures, but they would not have done me any good in this situation. I made no effort to get them; but I looked into the competing situation where we have competing plants. I couldn't tell you

how old the present plant in Plainview is. I don't know anything about the physical plant down there. I have never checked into that. I do know, in a general way, that the last engine was put in there in about 1929, I think; I am not certain.

The Diesel plant in Plainview at the present time is used for stand-by service only. The city of Plainview gets its electricity from a high line. I am not familiar with the division of business between the municipal and the privately-owned plants in the city of Seattle. I have known what that is, but I can't remember the figures now. I have not had occasion to refer to them. I have not examined the Seattle figures for some time. The privately-owned plant in Seattle is owned by the Engineers Public Service Company, which is entirely a separate concern, although a subsidiary of Stone & Webster, Incorporated, separate from the one in which I work. I think it is true that the City of Seattle is one of the two large cities in the country where privately-owned plants and municipally-owned plants operate side by side in competition. When I was preparing my figures as to the division of business between privately-owned plants and municipally-owned plants where they compete, I did not give any consideration to the division of business in the City of Seattle. I do not know
739 whether it is a fact that in Seattle the municipal plant gets 60 per cent of the total domestic business and the private plant 40 per cent. I know that it varies from time to time. There is no fixed point about any of that. When I testified to the division of business, the statement made was that averaged over a long period of years, with approximately equal rates, you would find equal division of revenues. Conditions differ in various parts of the country and they vary from year to year.

Thereupon **N. T. Veatch, Jr.** was recalled as a wit-
740 ness for and on behalf of the plaintiffs in rebuttal and, having been previously duly sworn, testified further as follows:

Direct Examination—resumed

I have prepared a schedule entitled "Cost of Construction and Operation of Water Supply to Replace that owned

by Texas Utilities Company". The first figure on this schedule, $14,760, was taken from Mr. McDonald's testimony. The second figure was taken from the application of the City of Plainview to PWA. The remaining figures are based on my own knowledge and experience and knowledge of the general site and location of supply. The figures are correct, to the best of my knowledge and experience.

Whereupon a table entitled "Plainview, Texas; Cost of Construction and Operation of Water Supply to Replace that owned by Texas Utilities Company" was marked "Plaintiffs' Exhibit 275" and was received in evidence.

Plaintiffs' Exhibit 275—In Evidence

Plainview, Texas

Cost of Construction and Operation of Water Supply to Replace That Owned by Texas Utilities Company

Cost of Construction

3 Wells @ $14,760	$44,280
Pipe lines to present distribution system	17,838
Collecting pipe lines	1,500
Electrical Substation	5,000
Electrical Transmission and Distribution lines	2,000
Total cost of construction	$70,618

Cost of Operation

Electric current from proposed municipal electric plant	$4,655
Maintenance	500
Depreciation @ 1½% per year	1,060
Amortization and debt service	5,195
Total cost of operation	$11,410

741 Cross Examination

On Exhibit 275 there is an item of Amortization and Debt Service, $5,195. That is on the total cost represented above, $70,618. The depreciation at 1½ per cent per year, $1,060, is on the total cost. In arriving at the item of $4,655 for electric current from proposed municipal electric plant,

I had the amount of current used by the company in pumping in the year 1935, and I used the cost of production according to my estimates of the proposed plant in Plainview. I assumed that the current would be sold by the electric department to the water department of Plainview at production cost. I did not get the figure of $11,410 based upon the present contract rate between the City and the Company. That is my estimate of what the cost to the City would be if they put in their own water supply.

Be it further remembered that the foregoing con-
742 tains the substance of all the evidence given at the hearing of the above-entitled causes, and in order that the same may be made of record this Statement of Evidence is duly stated, approved, signed and ordered to be made of record in the above-entitled causes and in each of them this 15th day of August, 1936.

By the Court.

ALFRED A. WHEAT,
Chief Justice.

743 In the District Court of the United States
For the District of Columbia.

Holding an Equity Court.

Filed Aug 14 1936 Charles E. Stewart, Clerk

Equity No. 58927

TEXAS UTILITIES COMPANY,

v.

HAROLD L. ICKES, ET AL.

Equity No. 59071

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES, ET AL.

Equity No. 59671

ALABAMA POWER COMPANY,

v.

HAROLD L. ICKES, ET AL.

Equity No. 60245

IOWA CITY LIGHT AND POWER COMPANY,

v.

HAROLD L. ICKES, ET AL.

Stipulation

It is hereby stipulated and agreed between the parties to the above entitled causes, by their respective counsel, that the foregoing statement of evidence is a true, full, correct, and complete statement of all the evidence taken and given on the trial of these cases.

August 14, 1936.

HOWARD C. WESTWOOD,
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WALTER B. GUY and LOUIS H. MANN,
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Counsel for the Public Works Administration.

THOMAS A. COWAN,
Special Attorney.

Counsel for Defendants.

744 Endorsed on cover: District Court of the United States District of Columbia. No. 6579. Texas Utilities, a corporation organized and existing under the laws of the State of Texas, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6580. Alabama Power Company, a Corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. No. 6583. Alabama Power Company, a corporation, Appellant, vs. Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works et al. United States Court of Appeals for the District of Columbia. Filed Aug. 18, 1936. Moncure Burke, Clerk.